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Supreme Court, U.S.

FILED

NOV 20 1971

E. ROBERT SEAVER, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-188

**PECOLA ANNETTE, WRIGHT, ET AL.,
PETITIONERS,**

—v.—

COUNCIL OF THE CITY OF EMPORIA, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

CERTIORARI GRANTED OCTOBER 12, 1971

PETITION FOR WRIT OF CERTIORARI FILED MAY 20, 1971

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Jury demand date:

On file:
On motion:
On presentation:

TITLE OF CASE

J. S. 5

ATTORNEYS

For plaintiff: Tucker and Marsh

214 East Clay Street

S. D. TUCKER

HENRY L. MARSH

PEGOLA ANNETTE WRIGHT, LAVERNE WRIGHT,

JAMES E. WRIGHT JR., and COLA M. WRIGHT,

infants, by James E. Wright and Maggie Wright,
their father and mother and next friends, et al

vs

COUNTY SCHOOL BOARD OF GREENSVILLE COUNTY, VA.

CARY P. FLYTHE, Dec'd.

ADOLPHUS G. SLATE

LANDON S. TEMPLE

J. B. ADAMS

ANDREW G. WRIGHT (no longer with School Board) and
COUNCIL OF THE CITY OF EMPORIA

GEORGE W. LEE

S. G. KEEDWELL

L. R. BROTHERS, JR.

WILLIAM H. LIGON

JULIAN C. WATKINS

T. CATO TILLAR

M. L. NICHOLSON, JR.

FRED A. MORGAN

THE SCHOOL BOARD OF THE CITY OF EMPORIA

E. V. LANKFORD

JULIAN P. MITCHELL

P. C. TAYLOR

G. B. LIGON

For defendant:

Frederick T. Gray, Williams, Mullen
Christian, State Planters Bank Bldg

John Kay, Jr. 647-0

D. Dortch Warriner, Penitentiary
332 South Main Street, Emporia, Va

6-20-66 Plan approved - retained on dock

6-20-66 11-17-65, 11-18-65

SCHOOL CASE

CLASS ACTION 18USC1331 - 14th

Costs
Amendment

J.S. 5 mailed

Clerk

DATE

NAME OR
RECEIPT NO.

REC.

DISE

J.S. 5 mailed

Clerk

3-15-65

25.00

15.00

15.00

J.S. 6 mailed

Marshal

7-25-67

7-25-67

5.00

5.00

Basis of Action:

Docket fee

11-24-65

11-24-65

5.00

5.00

Action arose at:

Witness fees

3-20-70

3-20-70

5.00

5.00

Action arose at:

Depositions

2-25-70

2-25-70

5.00

5.00

PECOLA ANNETTE WRIGHT, LAVERNE WRIGHT,
JAMES E. WRIGHT, JR., and COLA M. WRIGHT,
infants, by James E. Wright and Maggie Wright,
their father and mother and next friends, et al

VS

COUNTY SCHOOL BOARD OF GREENSVILLE COUNTY, VA.

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JULIAN P. MITCHELL

P. C. TAYLOR

G. B. LIGON

For defendant:

Frederick T. Gray, Williams, Mullen
Christian, State Planters Bank Bldg

D. Dortch Warriner, Receiver

332 South Main Street, Emporia, V.

6-20-66 Plan approved - retained on dock

Consented 11-17-65. B. B. B.

SCHOOL CASE		STATISTICAL RECORD		CLASS ACTION 18USC1331 - 14th		Amendment		COSTS		NAME OR RECEIPT NO.		REC.		DISB	
J.S. 5 mailed						Clerk				3-15-65 27		15 00			
										3-16-65 91047				15 00	
J.S. 6 mailed						Marshal				7-25-67 Test Appeal		5 00			
										7-31-67 CID 5				5 00	
Basis of Action:						Docket fee				11-21-67 Deposition Rec					
										11-21-67 CID 26					
Action arose at:						Witness fees				3-20-70 Notice Appeal		5 00			
										2-25-70 CID 45				5 00	
						Depositions									

No. 4263

DATE	PROCEEDINGS	DATE	Judge
March 12	Complaint filed summons issued.		
" 29	Marshal's return on summons as to all defts. executed and filed		
Apr. 5	Motion to dismiss filed by County School Board of Greenville Co. Va., Cary P. Flythe, Adolphus G. Slate, Landon S. Temple and J. R. Adams, ind. & as members of the County School Board and Andrew G. Wright, Div. Supt. of Schools of Greenville Co., Va. affirmed.		
May 3	Motion for consolidation of motion to dismiss with hearing on merits, for requirement of answer by defts and for fixing of trial date filed by pltf's.		
" 5	Order deferring ruling on motion to dismiss; directing Clerk to call case at next docket call, ent. 5-5-65. Copies mailed as directed.** Defts. to answer on or before 6-1-65.		
May 7	Interrogatories filed by plf.		
" 24	Order extending time to 6-8-65 for deft. School Board to file answers to interrogatories, ent. 5-24-65. Copies mailed counsel of record.		
June 1 ✓	Answer filed by defts.		
" 18	Answer of County School Board of Greenville Co., Va. to interrogatories, filed, with exhibits.		
Sept. 8	Deposition of Andrew Graham Wright, received		
Nov. 3	List of witnesses pltf's expect to call and list of exhibits pltf's, expect to introduce filed.		
Nov. 5	List of witnesses defts. expect to call and list of exhibits they expect to introduce filed		
" 9	Depositions of Wm. I. Reavis & H. E. Wright received		
" 16	Additional witness plfs. expect to call, filed.		
Nov. 17	TRIAL PROCEEDINGS: Butzner, J.: Appearances: Parties by counsel. Plaintiff adduced evidence. Plaintiff rests. Defendant adduced evidence, rested.		
	Each side to present briefs and conduct re-hearing case soon after Nov. 17-65.		
Nov. 17	Plaintiff's statement of position and summary of facts filed in open court.		
" 18	Reporter's transcript of testimony of Dr. Bruce W. Welch filed.		
" 29	Reporter's transcript of proceedings of 11-17-65 filed.		
Dec. 1	Brief on behalf of defts. rec'd.		
Dec. 15	Brief for plaintiffs, received		
1966			
Jan. 19	Copy of letter from Acting U. S. Commissioner of Education announcing approval of Greenville County School plan by Department of Health, Education & Welfare, filed.		
Jan. 27	Memorandum of the Court filed		
" "	Order that defts motion to dismiss be denied; Pltfs. prayer for an injunction restraining school construction and the purchase of school sites denied		
	Defts. granted 90 days to submit amendments to their plan which will provide for employment and assignment of the staff on a non racial basis.		
	Pending receipt of these amendments, the Court will defer approval of the plan and consideration of other ya injunctive relief; Pltfs motion for counsel-fecs denied; Case to be retained on docket with leave granted to any party to petition for further relief; Pltfs shall recover their costs to date.		
	ent. & filed; Copies mailed as directed		
Apr. 27	Supplement Faculty plan filed		
May 4	TRIAL PROCEEDINGS-Butzner, J.: Parties appeared by counsel. Issues joined. Exceptions to plan supplement filed by plaintiffs. Case argued.		
	(see further proceedings at page 2)		

PROCEEDINGS

DATE

1966

May 13

Memorandum of the court with appendix plan of the County School Board of Coochland County, Virginia, to desegregate its school faculties, attached, filed May 13, 1966.

May 13

Order granting defendants ten days to submit amendments to their plan which will provide for employment and assignment of the staff on a non-racial basis and deferring approval of plan and consideration of other injunctive relief, entered and filed May 13, 1966. (copies of memorandum and of the order delivered to counsel)

" 20

Motion for leave to file and request for approval of a plan supplement filed by County School Board of Greenville Co.

June 10

IN OPEN COURT-Butzner, J.: Plan discussed by counsel. Court to approve Plan.

" 20

Memorandum of the Court filed.

" "

Order approving plan adopted by Greenville County School Board; retaining case on docket, ent. 6-20-66. Copies mailed counsel.

J. 1968

June 21

Interrogatories filed by pltf.

" "

Notice of Motion filed by pltf.

" "

Motion for further relief filed by pltf.

July 3

Defts. response to interrogatories #1

" 8

Order that defts. file plan for desegregation on or before 9-8-68, ent. 7-8-68.

" 10

Copies mailed counsel.

Order vacating order of 7-8-68; defts. shall on or before 7-30-68 advise the court

if they are in compliance with plan for desegregation of public school system as enunciated by U. S. Supreme Court in its decision of 5-27-68;

if defts. cannot properly file report of compliance, they shall file on or before 8-9-68 a plan for desegregation of the public school system which they

contend will bring them in compliance with the 5-27-68 decision aforesaid; plfs. shall file exceptions if any to any such plans within 3 days thereafter

" 22

ent. 7-10-68. Copies mailed counsel.

Aug. 8

Answers to interrogatories filed by County School Board of Greenville Co., Va. Report and Motion filed by County School Board of Greenville Co., as directed by order of 7-10-68.

" 13

Exceptions to Report filed by plfs.

Aug. 14

IN OPEN COURT: Merhige, J. Appearances: Parties by counsel. Waived opening. Deft adduced evidence, rested. Plaintiff adduced no evidence. Case taken under

Sept. 16

advisement.

" 16

Report and Plan of County School Board of Greenville Co. and S. A. Owen,

Sep. 14

Div. Supt. of Schools, rec'd and filed.

" 14

Pre-trial in open court-Merhige, J.

" 14

Order that Defts. granted until Jan. 20, 1969, to file plan; that said plfts.

Dec. 4

file any exceptions which they may have to said plan, if any, within five days

" 4

thereafter ent. & filed; copies mailed as directed.

1969

Jan. 23

Motion for extension of time to Jan. 31, 1969 for filing plan for desegregation

" 31

ordered filed by defts.

" 31

Report and Motion with proposed modifications of Freedom of choice plan (Exh. "A")

Feb. 11

filed by County School Board.

Feb. 25

Exceptions to report and motion filed by plfs.

" 25

TRIAL PROCEEDINGS: Merhige, J. Appearances: Parties by counsel. Defendant adduced

" 25

evidence, rested. Defendant's plan "A" rejected pl. "A"

May 13 Order granting defendants ten days to submit amendments to their plan which will provide for employment and assignment of the staff on a non-racial basis and deferring approval of plan and consideration of other injunctive relief, entered and filed May 13, 1966. (copies of memorandum and of the order delivered to counsel)

" 20 Motion for leave to file and request for approval of a plan supplement filed by County School Board of Greenville Co.

June 10 IN OPEN COURT-Butzner, J.: Plan discussed by counsel. Court to approve Plan.

" 20 Memorandum of the Court filed.

" " Order approving plan adopted by Greenville County School Board; retaining case on docket, ent. 6-20-66. Copies mailed counsel.

J 1968

June 21 Interrogatories filed by pltf.

" " Notice of Motion filed by pltf.

" " Motion for further relief filed by pltf.

July 3 Defts. response to interrogatories; interrogatory #3 received & filed

" 8 Order that defts. file plan for desegregation on or before 9-8-68, ent. 7-8-68. Copies mailed counsel.

" 10 Order vacating order of 7-8-68; defts. shall on or before 7-30-68 advise the court if they are in compliance with plan for desegregation of public school system as enunciated by U. S. Supreme Court in its decision of 5-27-68; if defts. cannot properly file report of compliance, they shall file on or before 8-9-68 a plan for desegregation of the public school system which they contend will bring them in compliance with the 5-27-68 decision aforesaid; plfs. shall file exceptions if any to any such plans within 3 days thereafter ent. 7-10-68. Copies mailed counsel.

" 22 Answers to interrogatories filed by County School Board of Greenville Co., Va.

Aug. 8 Report and Motion filed by County School Board of Greenville Co., as directed by order of 7-10-68.

" 13 Exceptions to Report filed by plfs.

Aug. 14 IN OPEN COURT: Merhige, J. Appearances: Parties by counsel. Waived opening. Deft adduced evidence, rested, plaintiff adduced no evidence. Case taken under advisement.

Sept. 16 Report and Plan of County School Board of Greenville Co. and S. A. Oren, Div. Supt. of Schools, rec'd and filed.

Sep. 14 Pre-trial in open court-Merhige, J.

Dec. 4 Order that Defts. granted until Jan. 20, 1969, to file plan; that said plfts. file any exceptions which they may have to said plan, if any, within five days thereafter ent. & filed; copies mailed as directed.

1969

Jan. 23 Motion for extension of time to Jan. 31, 1969 for filing plan for desegregation ordered filed by defts.

" 31 Report and Motion with proposed modifications of freedom of choice plan (Exh. "A") filed by County School Board.

Feb. 11 Exceptions to report and motion filed by plfs.

Feb. 25 TRIAL PROCEEDINGS: Merhige, J. Appearances: Parties by counsel. Defendant adduced evidence, rested. Defendant's plan "A" rejected. Plan "Alternate" taken under advisement. Case continued generally.

Mar. 18 Proposed Plan for Desegregation filed by plfs.

June 5 Order that all parties appear on 6-17-69 at 3 P. M., in person or by counsel, for purposes of considering defts' report and motion heretofore filed, as well as plfs' proposed plan for desegregation, ent. 6-5-69. Copies mailed counsel.

DATE	PROCEEDINGS	DATE
1969		July
June 23	TRIAL PROCEEDINGS: Marhige, J. Appearances: Parties by counsel. Opening statements. Defendant adduced evidence. Rested. Finding of fact and conclusions of law started from bench. Defendants plan as submitted is rejected, and Plaintiff's plan is to be put into effect.	
June 23	Minutes of the court filed.	
" 25	Order denying defts' proposed use of freedom of choice plan, etc; defts' proposed use of alternative plan set forth in Exhibit A is denied; enjoining defts. permanently, etc. to disestablish existing dual system of racially identifiable public schools being operated in Greenville Co., and to replace that system of schools with a unitary system; enjoining defts. mandatorily to take necessary steps to the end, that proposed plan for desegregation filed by plfs. under date of 3-18-69 be put into effect commencing with the school term beginning in Sept. 1969; defts. to report to this court by no later than 8-15-69 their actions in compliance with this decree, etc., ent. 6-25-69. Copies mailed counsel of record and delivered to U. S. Marshal for service on each of the defendants herein.	
July 1	Marshal's return on above order executed, filed.	
" 23	Notice of Motion to amend judgment filed by defts.	
" "	Motion to amend judgment together with plan for operation filed by defts.	
July 25	NOTICE OF APPEAL filed by County School Board of Greenville County	
July 25	Undertaking on appeal filed	
July 31	TRIAL PROCEEDINGS: Marhige, J. Appearances: Parties by counsel. Arguments heard on proposed plan. Decision withheld.	
July 31	Minutes of court filed.	
Aug. 1	Notice to file supplemental complaint and for interlocutory injunction, filed by plfs.	
" "	Statement of Authorities filed by plfs.	
" "	Order filing supplemental complaint and directing copies with copy of original complaint, copy of court's order of 6-25-69 and this order be served by the U. S. Marshal on each of the defts.; said defts. to answer said supplemental complaint within 15 days after service thereof; plf's motion for interlocutory injunction is set for hearing on 8-8-69, at 10 A. M., ent. 8-1-69. Copies delivered to U. S. Marshal and mailed counsel.	
Aug. 1	Supplemental complaint filed.	
" 4	Marshal's return on supplemental complaint executed, filed.	
" 8	Motion for amendment of order rendered on July 31, 1969, filed.	
Aug 8	TRIAL PROCEEDINGS - Marhige, J. Appearances: Parties by counsel. Plaintiff adduced evidence, rested. Defendant adduced evidence, rested. FECL stated from the bench. Motion for interlocutory injunction granted. Case continued to December 18, 1969, for hearing on issuance of permanent injunction.	
Aug. 18	Findings of fact filed.	
" "	Order enjoining & restraining E. V. Lankford, Julian P. Mitchell, P. S. Taylor, G. B. Ligon, William H. Ligon, L. R. Brothers, Jr., T. Cato Tillar, Fred A. Morgan, Julian C. Watkins, S. G. Keedwell, M. L. Nicholson, Jr., Robert F. Hutcheson etc. from any action which would interfere in any manner whatsoever with the implementation of the Court's Order heretofore entered in reference to the operation of public schools for the student population of Greenville County & the City of Emporia; Order to be effective upon plts. giving security in sum of \$100.00 for payment of costs and damages & Order to remain in full force & effect for 140 days, unless sooner modified, enlarged or dissolved; denying motion for stay, Ent. & filed; Copies turned over to Marshal for service	

Defendants' proposed evidence. Roster. Finding of fact and conclusions of law stated from bench. Defendants plan as submitted is rejected, and Plaintiff's plan is to be put into effect.

June 23 Minutes of the court filed.

" 25 Order denying defts', proposed use of freedom of choice plan, etc.; defts' proposed use of alternative plan set forth in Exhibit A is denied; enjoining defts. permanently, etc. to disestablish existing dual system of racially identifiable public schools being operated in Greenville Co., and to replace that system of schools with a unitary system; enjoining defts. mandatorily to take necessary steps to the end that proposed plan for desegregation filed by plfs. under date of 3-18-69 be put into effect commencing with the school term beginning in Sept. 1969; defts. to report to this court by no later than 8-15-69 their actions in compliance with this decree, etc., ent. 6-25-69. Copies mailed counsel of record and delivered to U. S. Marshal for service on each of the defendants herein.

July 1 Marshal's return on above order executed, filed.

" 23 Notice of Motion to amend judgment filed by defts.

" " Motion to amend judgment together with plan for operation filed by defts.

July 25 NOTICE OF APPEAL filed by County School Board of Greenville County.

July 25 Undertaking on appeal filed

July 31 TRIAL PROCEEDINGS: Verhige, . . . Appearances: Parties by counsel. Arguments heard on proposed plan. Decision withheld

July 31 Minutes of court filed.

Aug. 1 Notice to file supplemental complaint and for interlocutory injunction, filed by plfs.

" " Statement of Authorities filed

" " Order filing supplemental complaint and directing copies with copy of original

complaint, copy of court's order of 6-25-69 and this order be served by the U. S. Marshal on each of the defts.; said defts. to answer said supplemental complaint within 15 days after service thereof; plf's motion for interlocutory injunction is set for hearing on 8-8-69, at 10 A. M., ent. 3-31-8-1-69.

Copies delivered to U. S. Marshal and mailed counsel.

Aug. 1 Supplemental complaint filed.

" 4 Marshal's return on supplemental complaint executed, filed.

" 8 Motion for amendment of order rendered on July 31, 1969, filed.

Aug 8 TRIAL PROCEEDINGS - Verhige, J. Appearances: Parties by counsel. Plaintiff adduced evidence, rested. Defendant adduced evidence, rested. FECL stated from the bench. Motion for interlocutory injunction granted. Case continued to December 18, 1969, for hearing on issuance of permanent injunction.

Aug. 18 Findings of fact filed

" " Order enjoining & restraining E. V. Lankford, Julian P. Mitchell, P. S. Taylor, G. B. Ligon, William H. Ligon, L. R. Brothers, Jr., T. Gato Tillar, Fred A. Morgan, Julian C. Watkins, S. G. Keedwell, N. L. Nicholson, Jr., Robert F. Hutcheson etc. from any action which would interfere in any manner whatsoever with the implementation of the Court's Order heretofore entered in reference to the operation of public schools for the student population of Greenville County & the City of Emporia; Order to be effective upon pltfs. giving security in sum of \$100.00 for payment of costs and damages & Order to remain in full force & effect for 140 days, unless sooner modified, enlarged or dissolved; denying motion for stay. Ent. & filed; Copies turned over to Marshal for service

Aug. 15 Answer of defts. filed

Aug. 26 ORDER extending time full 90 days for docketing appeal, ent. & filed

Aug. 26, 1969. Clerk mailed copies to counsel and to reporter

(SEE FURTHER PROCEEDINGS AT PAGE 4)

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN ENCLUMES RETURN
		PLAINTIFF	DEFENDANT	
Oct. 9	Notice of Motion & Motion to dismiss supplemental complaint filed by defts.			
" "	Statement of authorities filed by defts.			
Oct. 17	IN OPEN COURT: Wernicke, Jr. Appearance: Parties by counsel.			
	Motion to dismiss supplemental complaint, argued.			
	Taken under advisement.			
Oct. 17	Minutes of the court filed.			
Oct. 20	Order denying motion to dismiss and dismissing supplemental complaint filed herein on the grounds that the Court lacked jurisdiction. Copies mailed as directed, to counsel of record.			
Oct. 22	ORDER extending time for docketing appeal to Nov. 24, 1969, entered by U S Court of Appeals Oct. 21, 1969, rev'd & filed Oct. 22, 1969			
Oct. 24	Motion to retain part of record in District Court pending appeal filed by defts.			
Oct. 27	ORDER that clerk is directed to retain in this Court the following parts of record, subject to the request of the Court of Appeals:			
	1. Pltff's. Notice of motion to file supplemental complaint; to add parties deft.; and for an interlocutory injunction filed Aug. 1, 1969;			
	2. Plaintiff's. statement of authorities, Filed Aug. 1, 1969.			
	3. Pltff's. supplemental complaint filed Aug. 1, 1969.			
	4. Findings of fact & conclusions of law, filed Aug. 8, 1969			
	5. ORDER granting temporary injunction, filed Aug. 8, 1969			
	6. Answer of deft's. , Council of the City of Emporia and its members & School Board of the City of Emporia & its members, filed Aug. 14, 1969.			
	7. Notice of motion and motion of deft's., Council of the City of Emporia & School Board of the City of Emporia & its members to dismiss supplemental complaint, filed Oct. 8, 1969.			
	8. ORDER denying deft's. motion, filed Oct. 21, 1969			
	9. Motion of deft's., Council of the City of Emporia and its members & School Board of the City of Emporia & its members to retain part of record in District Court pending appeal.			
	10. Any other pleadings, orders, or documents relating to the proceedings on pltff's. supplemental complaint, including transcripts.			
	FUTHER ORDERED that clerk shall transmit copy of this ORDER to USCA for the Fourth Circuit ent. & filed; Notice to counsel			
Nov. 19	Original and one copy of Reporters Transcript dated Feb. 25, 1969, filed			

Statement of authorities filed by defts.

Oct 17 IN OPEN COURT: Marhiga, Jr. Appearance: Parties by counsel.

Motion to dismiss supplemental complaint, argued.

Taken under advisement.

Oct 17 Minutes of the court filed.

Oct. 20 Order denying motion to dismiss and dismissing supplemental complaint

filed herein on the grounds that the Court lacked jurisdiction. Copies mailed as directed, to counsel of record.

Oct 22 ORDER extending time for docketing appeal to Nov. 24, 1969, entered by U S Court of Appeals Oct. 21, 1969, rcvd & filed Oct. 22, 1969

Oct. 24 Motion to retain part of record in District Court pending appeal filed by defts.

Oct. 27 ORDER that clerk is directed to retain in this Court the following parts of record, subject to the request of the Court of Appeals:

1. Pltff's. Notice of motion to file supplemental complaint; to add parties deft.; and for an interlocutory injunction filed Aug. 1, 1969;

2. Plaintiff's. statement of authorities, Filed Aug. 1, 1969.

3. Pltff's. supplemental complaint filed Aug. 1, 1969

4. Findings or fact & conclusions of law, filed Aug. 8, 1969

5. ORDER granting temporary injunction, filed Aug. 8, 1969

6. Answer of deft's. Council of the City of Emporia and its members & School Board of the City of Emporia & its members, filed Aug. 14, 1969.

7. Notice of motion and motion of deft's., Council of the City of Emporia & School Board of the City of Emporia & its members to dismiss supplemental complaint, filed Oct. 8, 1969.

8. ORDER denying deft's. motion, filed Oct. 21, 1969

9. Motion of deft's., Council of the City of Emporia and its members & School Board of the City of Emporia & its members to retain part of record in District Court pending appeal.

10. Any other pleadings, orders, or documents relating to the proceedings on pltf's. supplemental complaint, including transcripts.

FURTHER ORDERED that clerk shall transmit copy of this ORDER to USCA for the Fourth Circuit ent. & filed; Notice to counsel

Nov. 19 Original and one copy of Reporters Transcript dated Feb. 25, 1969, filed

Nov. 19 Original and one copy of Reporters Transcript dated June 23, July 31, 1968, August 14, 1968 and Aug. 8, 1969, filed.

see page 5

1969	FILINGS-PROCEEDINGS		CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
			PLAINTIFF	DEFENDANT	
Nov. 19	APPEAL RECORD, Vols. I-VII and exhibits, delivered to Clerk, USCA. (see letter in case file)				
Dec. 3	Defendant's list of witnesses and exhibits, rec'd, filed.				
Dec. 18	TRIAL PROCEEDINGS: Merhege, J. Appearances: Parties by counsel. Plaintiff adduced evidence, rested. Defendant adduced evidence, rested. Arguments Case taken under advisement by court.				
	Minutes of court filed.				
Dec 31	APPEAL RECORD VOLS 1-VII & exhibits rcvd from Clerk USCA				
Dec 31	Copy of order of USCA dismissing appeal, filed				
1970					
Jan. 23	Rebuttal Brief of Council and School Board of Emporia to Plaintiff's Memo filed by Torrich Warriner and John F. Kay, Jr. attys for defts.				
Mar 2	MEMORANDUM OPINION of the Court dated March 2, 1970, filed. Clerk mailed copies to counsel				
Mar 2	ORDER on memorandum of March 2, 1970, denying motion of the defendants, Council of the City of Emporia and the members thereof, and the School Board of the City of Emporia and the members thereof, and the dissolve the Court's injunction heretofore entered on Aug. 3, 1969 and decreeing that said order shall remain in full force and effect until further order; denying motion of the defendant School Board of the City of Emporia to modify the decree of this Court entered on June 23, 1969, as modified on July 30, 1969, and				
	1970. Clerk mailed copies to counsel				
Mar 19	NOTICE OF APPEAL from order entered on March 2, 1970 filed by defendants, Council of the City of Emporia and the members thereof and the School Board of the City of Emporia and the members thereof. Notice under Local Rule 31 issued by clerk.				
Mar 19	Appeal undertaking \$230 filed				
March 20	Designation of Parts of Transcript to be included in Record and Statement of Issues filed by deft.				
March 24	ORDER- that entire proceedings held on 8/8/69 & 12/18/69 except opening statements & closing arguments by counsel be transcribed for the appeal filed by defts, ent. 3/24/70 and filed. Copy deliver to Court reporter, & mailed to attys.				
Apr 7	Reporter's transcript of hearing on Dec. 18, 1969, filed Mar. 2, 1970				

Dec. 18	TRIAL PROCEEDINGS: Merhege, J. Appearances: Parties by counsel. Plaintiff adduced evidence, rested. Defendant adduced evidence, rested. Arguments. Case taken under advisement by court.
	Minutes of court filed.
Dec 31	APPEAL RECORD VOLS 1-VII & exhibits rcvd from Clerk USCA
Dec 31	Copy of order of USCA dismissing appeal, filed
1970	
Jan. 23	Rebuttal Brief of Council and School Board of Emporia to Plaintiff's Memo filed by
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Mar 2	ORDER on memorandum of March 2, 1970, denying motion of the defendants, council of the City of Emporia and the members thereof, and the School Board of the City of Emporia and the members thereof, to dissolve the Court's injunction heretofore entered on Aug. 3, 1969 and decreeing that said order shall remain in full force and effect until further order; denying motion of the defendant School Board of the City of Emporia to modify the decree of this Court entered on
	JUNE 11, 1970, as modified on July 20, 1970.
	1970. Clerk mailed copies to counsel
Mar 19	NOTICE OF APPEAL from order entered on March 2, 1970 filed by defendants, Council of the City of Emporia and the members thereof and the School Board of the City of Emporia and the members thereof. Notice under Local Rule 31 issued by clerk.
Mar 19	Appeal undertaking \$250 filed
March 20	Designation of Parts of Transcript to be included in Record and Statement of Issues filed by deft.
March 24	ORDER- that entire proceedings held on 8/8/69 & 12/18/69 except opening statements & closing arguments by counsel be transcribed for the appeal filed by defts. ent. 3/24/70 and filed. Copy deliver to Court reporter. & mailed to attys.
Apr 7	Reporter's transcript of hearing on Dec. 18, 1969, filed Mar. 2, 1970

1a

Docket Entries

Complaint

[filed March 15, 1965]

IN THE UNITED STATES DISTRICT COURT**FOR THE EASTERN DISTRICT OF VIRGINIA****Richmond Division****CIVIL ACTION No. 4263**

PECOLA ANNETTE WRIGHT, LAVERNE WRIGHT, JAMES E. WRIGHT, JR., and COLA M. WRIGHT, infants, by James E. Wright and Maggie Wright, their father and mother and next friends, *et al.*,

Plaintiffs,

vs.

COUNTY SCHOOL BOARD
OF GREENSVILLE COUNTY, VIRGINIA, *et al.*,

*Defendants.***I.**

1. (a) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. This action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, and under Title 42, United States Code, Section 1981, as hereafter more fully appears. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars (\$10,000.00).

(b) Jurisdiction is further invoked under Title 28, United States Code, Section 1343(3). This action is authorized by Title 42, United States Code, Section 1983 to be commenced.

Complaint

by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States and by Title 42, United States Code, Section 1981, providing for the equal rights of citizens and of all persons within the jurisdiction of the United States, as hereafter more fully appears.

II

2. Infant plaintiffs are Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the political subdivision of Virginia for which the defendant school board maintains and operates public schools. Said infants are within the age limits or will be within the age limits to attend, and possess or upon reaching such age limit will possess all qualifications and satisfy all requirements for admission to, said public schools.

3. Adult plaintiffs are Negroes, are citizens of the United States and are residents and taxpayers of and domiciled in the Commonwealth of Virginia and the above mentioned political subdivision thereof. Each adult plaintiff who is named in the caption as next friend of one or more of the infant plaintiffs is a parent, guardian or person standing in *loco parentis* of the infant or infants indicated.

4. The infant plaintiffs and their parents, guardians and persons standing in *loco parentis* bring this action in their own behalf and, there being common questions of law and fact affecting the rights of all other Negro children attend-

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ing public schools in the Commonwealth of Virginia and, particularly, in the said political subdivision, similarly situated and affected with reference to the matters here involved, who are so numerous as to make it impracticable to bring all before the Court, and a common relief being sought as will hereinafter more fully appear, the infant plaintiffs and their parents, guardians and persons standing in *loco parentis* also bring this action, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, as a class action on behalf of all other Negro children attending or who hereafter will attend public schools in the Commonwealth of Virginia and, particularly, in said political subdivision and the parents and guardians of such children similarly situated and affected with reference to the matters here involved.

5. Further, the adult plaintiffs bring this action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure as a class action on behalf of those of the citizens and taxpayers of said political subdivision who are Negroes; the tax raised contribution of persons of that class toward the establishment, operation and maintenance of the schools controlled by the defendant school board being in excess of \$10,000.00: The interests of said class are adequately represented by the plaintiffs.

III

6. The Commonwealth of Virginia has declared public education a state function. The Constitution of Virginia, Article IX, Section 129, provides:

“Free schools to be maintained. The General Assembly shall establish and maintain an efficient system of public free schools throughout the State.”

Complaint

Pursuant to this mandate, the General Assembly of Virginia has established a system of public free schools in the Commonwealth of Virginia according to a plan set out in Title 22, Chapters 1 to 15, inclusive, of the Code of Virginia, 1950. The establishment, maintenance and administration of the public school system of Virginia is vested in a State Board of Education, a Superintendent of Public Instruction, Division Superintendents of Schools, and County, City and Town School Boards (Constitution of Virginia, Article IX, Sections 130-133; Code of Virginia, 1950, Title 22, Chapter 1, Section 22-2).

IV

7. The defendant School Board exists pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative department of the Commonwealth, discharging governmental functions, and is declared by law to be a body corporate. Said School Board is empowered and required to establish, maintain, control and supervise an efficient system of public free schools in said political subdivision, to provide suitable and proper school buildings, furniture and equipment, and to maintain, manage and control the same, to determine the studies to be pursued and the methods of teaching, to make local regulations for the conduct of the schools and for the proper discipline of students, to employ teachers, to provide for the transportation of pupils, to enforce the school laws, and to perform numerous other duties, activities and functions essential to the establishment, maintenance and operation of the public free schools in said political subdivision. (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, as amended, Title 22.) The names of the individual members of the defendant School Board are as stated in the caption

Complaint

and they are made defendants herein in their individual capacities.

8. The defendant Division Superintendent of Schools, whose name as such is stated in the caption, holds office pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative officer of the public free school system of Virginia. (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, as amended, Title 22.) He is under the authority, supervision and control of, and acts pursuant to the orders, policies, practices, customs and usages of the defendant School Board. He is made a defendant herein as an individual and in his official capacity.

9. A Virginia statute, known as the Pupil Placement Act, first enacted as Chapter 70 of the Acts of the 1956 Extra Session of the General Assembly, viz, Article 1.1 of Chapter 12 of Title 22 (Sections 22-232.1 through 22-232.17) of the Code of Virginia, 1950, as amended, confers or purports to confer upon the Pupil Placement Board all power of enrollment or placement of pupils in the public schools in Virginia and to charge said Pupil Placement Board to perform numerous duties, activities and functions pertaining to the enrollment or placement of pupils in, and the determination of school attendance districts for, such public schools, except in those counties, cities or towns which elect to be bound by the provisions of Article 1.2 of Chapter 12 of Title 22 (Sections 22-232.18 through 22-232.31) of the Code of Virginia, 1950, as amended.

10. Plaintiffs are informed and believe that in executing its power or purported power of enrollment or placement of pupils in and determination of school districts for the public schools of said political subdivision, the Pupil Place-

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ment Board will follow and approve the recommendations of the defendant School Board unless it appears that such recommendation would deny the application of a Negro parent for the assignment of his child to a school attended by similarly situated white children.

11. The procedures provided by the Pupil Placement Act do not provide an adequate means by which the plaintiffs may obtain the relief here sought.

V

12. Notwithstanding the holding and admonitions in *Brown v. Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), the defendant School Board maintains and operates a biracial school system in which certain schools are designated for Negro students only and are staffed by Negro personnel and none other, and certain schools are designated for white students or primarily for white students and are staffed by white personnel and none other. This pattern continues unaffected except in the few instances, if any there are, in which individual Negroes have sought and obtained admission to one or more of the schools designated for white students. The defendants have not devoted efforts toward initiating nonsegregation in the public school system, neither have they made a reasonable start to effectuate a transition to a racially nondiscriminatory school system, as under paramount law it is their duty to do. Deliberately and purposefully, and solely because of race, the defendants continue to require or permit all or virtually all Negro public school children to attend schools where none but Negroes are enrolled and none but Negroes are employed as principal or teacher or administrative assistant and to require all white public school children to

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attend school where no Negroes, or at best few Negroes, are enrolled and where no Negroes teach or serve as principal or administrative assistant.

13. Heretofore, petitions signed by several persons similarly situated and conditioned as are the plaintiffs with respect to race, citizenship, residence and status as taxpayers, were filed with the defendant School Board, asking the School Board to end racial segregation in the public school system and urging the Board to make announcement of its purpose to do so at its next regular meeting and promptly thereafter to adopt and publish a plan by which racial discrimination will be terminated with respect to administrative personnel, teachers, clerical, custodial and other employees, transportation and other facilities, and the assignment of pupils to schools and classrooms.

14. Representatives of the plaintiff class forwarded said petitions to the defendant School Board with a letter, copy of which was sent to each member of the defendant School Board, part of which is next set forth:

“ * * * In the light of the following and other court decisions, your duty [to promptly end racial segregation in the public school system] is no longer open to question:

Brown v. Bd. of Education, 347 U.S. 483 (1954);

Brown v. Bd. of Education, 349 U.S. 294 (1955);

Cooper v. Aaron, 358 U.S. 1 (1958);

Bradley v. School Bd. of the City of Richmond,
317 F.2d 429 (4th Cir. 1963);

Bell v. Co. School Bd. of Powhatan Co., 321 F.2d
494 (4th Cir. 1963).

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"We call to your attention the fact that in the last cited case the unyielding refusal of the County School Board of Powhatan County, Virginia, to take any initiative with regard to its duty to desegregate schools resulted in the board's being required to pay costs of litigation including compensation to the attorneys for the Negro school children and their parents. We are advised that upon a showing of a deliberate refusal of individual school board members to perform their clear duty to desegregate schools, the courts may require them as individuals to bear the expense of the litigation.

"In the case of *Watson v. City of Memphis*, 373 U.S. 526 (1963) the Supreme Court of the United States expressed its unanimous dissatisfaction with the slothfulness which has followed its 1955 mandate in *Brown v. Board of Education*, saying: 'The basic guaranties of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.'"

15. More than two regular meetings of the defendant School Board have been held since it received the petitions and letter above referred to. Neither by word or deed has the defendant School Board indicated its willingness to end racial segregation in its public school system.

VI

16. In the following and other particulars, plaintiffs suffer and will continue to suffer irreparable injury as a result of the persistent failure and refusal of the defendants to initiate desegregation and to adopt and implement a plan providing for the elimination of racial discrimination in the public school system.

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17. Negro public school children are yet being educated in inherently unequal separate educational facilities specially sited, built, equipped and staffed as Negro schools, in violation of their liberty and of their right to equal protection of the laws.

18. Negro adult citizens are yet being taxed for the support and maintenance of a biracial school system the very existence of which connotes a degrading classification of the citizenship status of persons of the Negro race, in violation of the Fourteenth Amendment to the Constitution.

19. Public funds are being spent and will be spent by the defendants for the erection of schools and additions to schools deliberately planned and sited so as to insure or facilitate the continued separation of Negro children in the public school system from others of similar age and qualification solely because of their race, contrary to the provisions of the Fourteenth Amendment which forbid governmental agencies, whether acting ingeniously or ingenuously, to make any distinctions between citizens based on race.

20. This action has been necessitated by reason of the failure and refusal of the individual members of the defendant School Board to execute and perform their official duty, which since May 31, 1955 has been clear, to initiate desegregation and to make and execute plans to bring about the elimination of racial discrimination in the public school system.

VII

WHEREFORE, plaintiffs respectfully pray:

A. That the defendants be restrained and enjoined from failing and refusing to adopt and forthwith implement a

Complaint

plan which will provide for the prompt and efficient elimination of racial segregation in the public schools operated by the defendant School Board, including the elimination of any and all forms of racial discrimination with respect to administrative personnel, teachers, clerical, custodial and other employees, transportation and other facilities, and the assignment of pupils to schools and classrooms.

B. That pending the Court's approval of such plan the defendants be enjoined and restrained from initiating or proceeding further with the construction of any school building or of any addition to an existing school building or the purchase of land for either purpose to any extent not previously approved by the Court.

C. That the defendants pay the costs of this action including fees for the plaintiffs' attorneys in such amounts as to the Court may appear reasonable and proper and that the plaintiffs have such other and further relief as may be just.

S. W. TUCKER
Of Counsel for Plaintiffs

S. W. TUCKER
HENRY L. MARSH, III
WILLARD H. DOUGLAS, JR.
214 East Clay Street
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JACK GREENBERG
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10 Columbus Circle, Suite 2030
New York, New York 10019

Answer

[filed June 1, 1965]

IN THE UNITED STATES DISTRICT COURT**FOR THE EASTERN DISTRICT OF VIRGINIA****Richmond Division**

The undersigned defendants for Answer to the Complaint exhibited against them say as follows:

1. These defendants deny that the amount in controversy herein exceeds the sum of Ten Thousand Dollars (\$10,000.00) as alleged in paragraph 1 (a) of the Complaint.

2. These defendants deny that this Court has jurisdiction under Title 28, United States Code, Section 1331 or Title 28, United States Code, Section 1343(3) or Title 42, United States Code, Section 1983 to grant any of the relief prayed for in the Complaint.

3. The allegations of paragraphs 2 and 3 of the Complaint are neither admitted or denied but the defendants believe the allegations to be essentially true.

4. These defendants specifically deny that there are questions of law and fact *affecting the rights of all other Negro children attending public schools in the said political subdivision* and call for strict proof thereof and of the fact that it is impracticable to bring all before the Court who desire the relief being sought. These defendants affirmatively allege that, as will hereinafter more fully appear, the Constitutional and statutory rights of all children in the said political subdivision, in so far as public schools

Answer

are concerned, are protected by the defendants and the desire for the relief being sought is common only to the named plaintiffs.

5. These defendants deny that grounds for a class action exist as alleged in paragraph 5 of the Complaint and deny that those constituting the group seeking relief herein contributed taxes in excess of \$10,000.00 and call for strict proof.

6. The allegations of paragraphs 6, 7, 8 and 9 of the Complaint are admitted insofar as they assert the existence of various Constitutional and statutory provisions of the Commonwealth of Virginia. These defendants are not required and therefore do not admit or deny the accuracy of the plaintiffs' interpretation of the provisions of law to which reference is made.

7. These defendants believe the allegations of paragraph 10 to be correct except that they believe that the Pupil Placement Board would refuse to follow any recommendations which denied an application due to the race of the applicant whether the applicant be Negro or white.

8. These defendants, in answer to paragraph 11 of the Complaint, assert that the assignment procedures available to the plaintiffs afford an adequate means for obtaining all rights to which they are entitled.

9. The allegations of paragraphs 12, 13, 14, 15, 16, 17, 18, 19 and 20 are denied except that the defendants admit having received the petition and letter referred to in paragraphs 13 and 14.

Answer.

10. Infant plaintiffs and all others eligible to enroll in the pupil schools in the political subdivision are permitted, under existing policy, to attend the school of their choice without regard to race subject only to limitations of space.

WHEREFORE, defendants pray to be dismissed with their costs.

COUNTY SCHOOL BOARD OF GREENSVILLE
COUNTY, VIRGINIA

CARY P. FLYTHE
ADOLPHUS G. SLATE
LONDON S. TEMPLE
J. B. ADAMS

Individually and as members
of the County School Board of
Greensville County, Virginia

ANDREW G. WRIGHT,
Division Superintendent of
Schools of Greensville County,
Virginia

By: FREDERICK T. GRAY
Of Counsel

H. Benjamin Vincent
Emporia, Virginia

Frederick T. Gray
Williams, Mullen & Christian
1309 State-Planters Bank Building
Richmond, Virginia

[Certificate of Service Omitted in Printing]

Memorandum of the District Court

[filed January 27, 1966]

The infant plaintiffs, as pupils or prospective pupils in the public schools of Greenville County, and their parents or guardians have brought this class action asking that the defendants be required to adopt and implement a plan which will provide for the prompt and efficient racial desegregation of the county schools, and that the defendants be enjoined from building schools or additions and from purchasing school sites pending the court's approval of a plan. The plaintiffs also seek attorneys' fees and costs.

The defendants have moved to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted. They have also answered denying the material allegations of the bill.

Greenville County is a rural county located on the North Carolina line. Approximately 4,500 pupils attend county schools, about 2,700 are Negro and 1,800 are white. Its school board operates one white and four Negro elementary schools, and separate Negro and white high schools. Both white schools are located in Emporia, a town near the center of the county. Homes of Negro and white persons are scattered throughout the county.

Prior to September 1965, the county operated segregated schools based on a system of dual attendance areas. The white schools in Emporia served all white pupils in the county. The four Negro elementary schools were geographically zoned, and the Negro high school served all Negro pupils in the county.

Until April 1965 the county operated under the Virginia Pupil Placement Act, §§ 22—232.1, *et seq.*, Code of Vir-

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ginia, 1950, as amended. During that time only one Negro applied for admission to a white school, and she withdrew her application.

In April 1964 Negro citizens petitioned the school board to adopt a plan to desegregate the schools. The board did not comply with their request, and this suit was filed on March 15, 1965.

On April 21, 1965 the school board adopted a plan to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000.d-1, *et seq.* This plan has been amended several times. It was approved by the United States Commissioner of Education on January 12, 1966 after the hearing in this case.

In September 1965, 72 Negro pupils were transferred, upon their applications, to white schools—35 to Emporia Elementary School and 37 to the high school. One or more Negro pupils are in every grade from the first through the tenth.

There are no white teachers in the Negro schools and no Negro teachers in the white schools. The board has held integrated faculty meetings. Last summer an integrated faculty conducted a "Head Start" program in a Negro school, which was attended by 97 Negro children. The Greenville County plan provides:

"The Greenville County School Board has adopted a policy of complete freedom of choice to be offered annually in all grades of all schools without regard to race, color or national origin.

"SECTION I. ASSIGNMENT OF PUPILS

"A form letter will be sent home by every child containing provisions of the freedom of choice plan

Memorandum of the District Court

with a placement form at least 15 days before the date when the form must be returned. This procedure will be followed annually.

"A. Pre-Registration of First Grade Pupils for Fall of 1966

"Pre-registration of pupils planning to enroll in first grade for the fall 1966 semester will take place in all of the elementary schools on Friday, May 13. Under policies adopted by the Greenville County School Board parents or guardians may go directly to the school of their choice wherein they wish to send their child to school next year. At the time of pre-registration a choice may be expressed by filling in a Greenville County pupil placement form. The assignment will be made without regard to race, color, creed, or national origin. In the event of overcrowding preference will be given without regard to race to those choosing the school who reside closest to it. No choice submitted prior to the deadline will be rejected for any reason other than overcrowding of facilities.

"Pupils who fail to register on May 13 may be registered at the school of their choice on August 26th immediately prior to the opening of schools for the 1966 fall semester, but first preference in choice of schools will be given to those who pre-register in the spring period.

"B. Pupils Entering Other Grades

Each parent will be sent annually a letter, the text of which is attached, explaining the provisions of the plan, together with a choice of school form, the text

Memorandum of the District Court

of which is also attached, at least 15 days before the date when the choice form must be returned. Choice forms and letters to parents will also be readily available to parents or students in the school offices during regular business hours.

"The choice of school form must either be mailed or brought to the school or to the Superintendent's office within 15 days from the date the forms were initially sent home by that school. The annual date for sending these forms home shall be May 1st or the closest school day thereto. Anyone not registering his choice by that date must file his choice of school form at the time of registration when school opens. Pupils and their parents or guardians are required to exercise their choice of schools and no pupil will be admitted or readmitted to any school until such a choice has been made as herein specified.

"This choice is granted to parents, guardians and their children. Teachers, principals, and other school personnel are not permitted to advise, recommend or otherwise influence choices. They are not permitted to favor or penalize children because of choices.

"C. Overcrowding

All choices of pupils, their parents or guardians for every grade in the Greenville County School System will be subject to the following qualification:

"In the event, overcrowding of a school would result if all choices to attend that school were granted, priority shall be given without regard to race, color or national origin, and with no preference for previous attendance at the school, to those children choosing the

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school who reside closest to it. In the case of elementary schools those whose choices to attend a school are denied on this basis will be notified and permitted to make a choice of another formerly all white or all Negro school. In the case of high schools those whose choices to attend a school are denied on this basis will be assigned to the other school in the system at which the grade is taught. Otherwise, all choices will be granted; none will be denied for any reason other than overcrowding. The standards prescribed by the Virginia Department of Public Instruction as to overcrowding shall be used in determining [sic] whether overcrowding exists with respect to any application which is denied.

"D. Any newly enrolled pupil who moves into the county may secure placement forms from the principal of the school of their choice necessary to complete registration and enrollment. The same detailed instructions mentioned above regarding their right of free choice of schools will be furnished to them at this time.

"E. This system will not accept non-resident students, nor will it make arrangements for resident students to attend schools in other school systems, where either such action would tend to preserve segregation or minimize desegregation. Any arrangement made for non-resident students to attend schools of this system, or for resident students to attend schools in another system, will assure that such students will be assigned without regard to race, color or national origin, and such arrangement will be fully explained in attachment made a part of this plan.

*Memorandum of the District Court***"SECTION II. BUS ROUTES**

Transportation will be provided on an equal basis without segregation or other discrimination because of race, color or national origin. The right to attend any school in the system will not be denied because of lack of school system transportation from the pupils home to the school chosen and the pupil or his family may have to provide their transportation if the school system is not required to provide it under the next sentence of this paragraph. To the maximum extent feasible, buses will be routed so as to serve each pupil choosing any school in the system. In any event, every student eligible for bussing shall be transported to the school to which he is assigned as a provision of this plan if his first choice is either the formerly white or the formerly Negro school nearest his residence.

"SECTION III. EXTRA-CURRICULAR ACTIVITIES, FACILITIES AND SERVICES

There shall be no discrimination based on race, color, or national origin, with respect to any services, facilities, activities and programs sponsored by or affiliated with the schools of this system.

"SECTION IV. STAFF DESEGREGATION

A. The Greenville County School Board will assign all teachers on the basis of objective criteria such as certification, overall preparation and qualification for the position desired. In the case of each teacher employed by the school system in the 1964-65 school year who is not now employed, the race, color or national origin of such teacher was not a factor in the

Memorandum of the District Court

decision not to continue his or her employment. Steps shall be taken starting with the 1965-66 school year for the desegregation of faculty, at least including such actions as joint faculty meetings and joint in-service programs. Commencing immediately the following steps will be taken toward the elimination of segregation of teaching and staff personnel:

1. The pre-school in-service countywide teachers meetings will be held on a completely integrated basis.
2. All countywide staff meetings will be completely integrated.
3. All in-service classes will be open to all teachers regardless of race, color or national origin.

"B. This school system will not demote or refuse to re-employ principals, teachers, and other staff members who serve pupils on the basis of race, color or national origin. Any reduction in staff which may be required as a result of a decrease in enrollment will be accomplished without regard to race, color or national origin."

The school board has prefaced its plan by stating it has adopted a policy of complete freedom of choice for assignments.

Freedom of choice is a term frequently used when speaking of school desegregation. It has several meanings which should not be confused. It may refer to enrollment of pupils in segregated schools with the aid of state tuition grants in preference to attendance at public desegregated schools. See *Griffin v. School Board*, 377 U.S. 218, 222 (1964); Dure,

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Individual Freedom versus "State Action," 38 Va. Q. Rev. 400 (1962); Dillard, *Freedom of Choice and Democratic Values*, 38 Va. Q. Rev. 410 (1962).

In its plan the county uses the phrase, "freedom of choice," in an entirely different context. It employs the term to describe its method of assigning pupils to the public schools. The phrase probably was adopted from, "A General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools," published by the Department of Health, Education and Welfare.

The term freedom of choice has been used to describe various methods of assigning pupils. One method initially assigns pupils on a racial basis and allows freedom of choice to transfer from the initial assignment. This system of assignment is not sanctioned in this Circuit. In *Bradley v. School Board of the City of Richmond, Va.*, 345 F.2d 310, 319 (4th Cir. 1965), *vacated and remanded on other grounds*, 34 U.S.L. Week 3170 (U.S. Nov. 15, 1965), Judge Haynsworth said:

"In this circuit, we do require the elimination of discrimination from initial assignments as a condition of approval of a free transfer plan."

Cf. *Bowditch v. Buncombe County Bd. of Educ.*, 345 F.2d 329 (4th Cir. 1965); *Nesbit v. Statesville City Bd. of Educ.*, 345 F.2d 333 (4th Cir. 1965); *Buckner v. County School Bd. of Greene County, Va.*, 332 F.2d 452 (4th Cir. 1964).

Freedom of choice also has been used to refer to a non-restrictive assignment system. Judge Haynsworth described this method of assignment in *Bradley v. School Bd. of the City of Richmond, Va.*, 345 F.2d 310, 314 (4th Cir.

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1965), *vacated and remanded on other grounds*, 34 U.S.L. Week 3170 (U.S. Nov. 15, 1965):

"[E]very pupil initially entering the Richmond school system, or his parents for him, is required to state his choice as to the school he wishes to attend. He is assigned to the school of his choice. Every pupil promoted from any elementary school in Richmond, or his parents for him, is required to make a similar choice, and he is assigned to the school of his choice, as are those promoted from junior high school to senior high school. Every other pupil is assigned to the school he previously attended, but he may apply for a transfer to any other school, and, since transfer requests are routinely granted without hearings or consideration of any limited criteria, he is assigned to the school of his choice."

The Richmond plan was approved tentatively in *Bradley*. The pupil assignment features of the Greenville County plan are similar in material respects to those found in the Richmond plan. Greenville County requires a mandatory choice to be made annually by both white and Negro pupils. In this respect it satisfies a more strict interpretation of the requirements of the Fourteenth Amendment than that which was applied to the Richmond plan. In *Bell v. School Board of the City of Staunton, Va.*, No. 65-C-H (W.D.Va., Jan. 5, 1966), Judge Michie disapproved a plan which did not contain a provision for annual mandatory choice in all grades.

The principal attack leveled by the plaintiffs against the plan is its failure to assign pupils on a geographical basis. They contend that a freedom of choice plan does not satisfy the school board's obligation to eliminate racial segregation from the school system.

Memorandum of the District Court

In this circuit both freedom of choice plans and geographical zoning plans have been found constitutional. *Bradley v. School Board of the City of Richmond, Va.*, 345 F.2d 310 (4th Cir. 1965) *vacated and remanded on other grounds*, 34 U.S.L. Week 3170 (U.S. Nov. 15, 1965) (freedom of choice plan); *Gilliam v. School Board of City of Hopewell, Va.*, 345 F.2d 325 (4th Cir. 1965) *vacated and remanded on other grounds*, 34 U.S.L. Week 3170 (U.S. Nov. 15, 1965) (geographical zoning plan).

The school authorities have the primary responsibility for initiating plans to achieve a lawful school system. *Brown v. Board of Education*, 349 U.S. 294, 299 (1955). This circuit has recognized that local authorities should be accorded considerable discretion in charting a route to a constitutionally adequate school system. Freedom of choice plans are not in themselves invalid. They may, however, be invalid because the "freedom of choice" is illusory. The plan must be tested not only by its provisions; but by the manner in which it operates to provide opportunities for a desegregated education. In this respect operation under the plan may show that the transportation policy or the capacity of the schools severely limits freedom of choice, although provisions concerning these phases are valid on their face. This plan, just as the Richmond plan approved in *Bradley*, is subject to review and modification in the light of its operation. Mr. Justice Stewart in *Abington School Dist. v. Schempp*, 374 U.S. 203, 317 (1963 (dissenting opinion) said:

"A segregated school system is not invalid because its operation is coercive; it is invalid simply because our Constitution presupposes that men are created equal, and that therefore racial differences cannot provide a valid basis for governmental action."

Memorandum of the District Court

The Court recognizes that great weight should be given the approval of the plan by the United States Commissioner of Education. *Singleton v. Jackson Municipal School Dist.*, 348 F.2d 729 (5th Cir. 1965). The plan also must be tested by pertinent court decisions. Some of these have been published since the plan was adopted. In general, the plan contains adequate provisions for transition of the Greenville County school system.

The plan, however, is defective in one respect. Its provisions for staff desegregation are too limited. A satisfactory freedom of choice plan must include provisions for the employment and assignment of staff on a non-racial basis. *Bradley v. School Board of the City of Richmond, Va.*, 34 U.S.L. Week 3170 (U.S. Nov. 15, 1965); *Rogers v. Paul*, 34 U.S.L. Week 3200 (U.S. Dec. 6, 1965); *Kier v. County School Bd. of Augusta County, Va.*, No. 65-C-5-H (W.D.Va. Jan. 5, 1966).

The primary responsibility for the selection of means to achieve employment and assignment of staff on a non-racial basis rests with the school board. Witnesses for the plaintiffs and the defendants were in general agreement about the steps that must be taken to satisfactorily resolve this problem. They were not in agreement on the time table for taking these steps. The time may vary from community to community. The court is of the opinion that in the first instance the board should have the opportunity to appraise realistically the time and methods required. Several principles must be observed by the board. Token assignments will not suffice. The elimination of a racial basis for the employment and assignment of staff must be achieved at the earliest practicable date. The plan must contain well defined procedures which will be put into effect on definite dates. The board will be allowed ninety days to submit

Memorandum of the District Court

amendments to its plan dealing with staff employment and assignment practices.

The plaintiffs request that the defendants be restrained from proceeding with the construction of new school buildings and additions or purchasing new school sites until an adequate plan has been adopted. In their pre-trial brief, filed November 17, 1965, the plaintiffs urge that the court should require the school board to eliminate the segregated character of the school system by locating new schools in the system so as to promote integration. Little evidence was introduced concerning new construction. Apparently the school board plans to add additional classrooms to both high schools. It also plans to construct a Negro elementary school with fifteen classrooms to serve grades one through seven with a capacity for approximately 450 pupils. This construction is designed to rid a Negro school, known as the Greenville County Training School, of its outdated frame buildings.

This court is loathe to enjoin the construction of any schools. Virginia, in common with many other states, needs school facilities. New construction, however, cannot be used to perpetuate segregation. White pupils in the county have not transferred to Negro schools. Greenville County's recent experience shows that Negro pupils seek transfers to white schools. This could cause overcrowding of white schools coupled with vacancies in Negro schools. Denial of requests for transfers to white schools under these circumstances could require a geographical zoning plan or some other equitable means of assignment. The problem is recognized in *Wheeler v. Durham City Bd. of Educ.*, 346 F.2d 768, 774 (4th Cir. 1965), where Judge Boreman said:

"[4] From remarks of the trial judge appearing in the record, we think he was fully aware of the pos-

Memorandum of the District Court

sibility that a school construction program might be so directed as to perpetuate segregation. At the same time, he was reluctant to enter an order determining the location and size of new school facilities or what existing facilities should be enlarged. He clearly indicated his cognizance of the multitude of factors involved, such as the availability and cost of sites, the concentration of population, the present overcrowded conditions, etc. However, he was not unmindful of the responsibility of the Board in this area and he made known his conclusion that the burden would be on the Board to reasonably justify its actions and to demonstrate its good faith. Without specific or binding direction, the court expressed the hope that there would be some consultation between the parties to the litigation concerning the expansion program. The order last entered stated that the court has the assurance of the Board that its construction program would not be designed to perpetuate, maintain, or support desegregation. It has been held that a school construction program is an appropriate matter for court consideration. Conceivably the determination of the extent to which a busy court might or should undertake to formulate, direct, supervise, or police such a program would pose many problems. In view of the numerous factors involved in determining what, how, where and when new facilities are to be constructed or what old facilities may best be enlarged and renovated to meet pressing needs, the court's reluctance to issue a specific injunction is understandable, particularly since the Board was still subject to the provisions of the order of January 2, 1963, by which *any* and *all* acts that regulate or affect the assignment of pupils *on the basis of race or color* were enjoined."

Memorandum of the District Court

The primary responsibility concerning the selection of school sites and the construction of schools is the board's. This responsibility includes the obligation of not thwarting the county's freedom of choice plan by new construction.

The court concludes that new construction should not be enjoined. The evidence does not show that the plaintiffs will suffer irreparable harm. A new school building in itself cannot defeat the plaintiffs' choice of a desegregated education. The use, however, to which new facilities are put by the school board could cause a freedom of choice plan to become invalid. Then it will be necessary to modify the plan.

The plaintiffs' motion for the allowance of counsel fees will be denied. At the time the suit was filed no Negro pupils were being denied transfers to white schools. The case primarily involves a plan of desegregation. The situation is similar to that found in *Bradley v. School Board of the City of Richmond, Va.*, 345 F.2d 310, 321 (4th Cir. 1965) *vacated and remanded on other grounds*, 34 U.S.L. Week 3170 (U.S. Nov. 15, 1965), where counsel fees were not allowed for that part of the litigation pertaining to consideration of a plan.

The court concludes that defendant's motion to dismiss the complaint for failure to state a claim should be overruled. Cf. *Rogers v. Paul*, 34 U.S.L. Week 3200 (U.S. Dec. 6, 1965).

/s/ JOHN D. BUTZNER, JR.
United States District Judge

January 27, 1966

Order of District Court

[filed January 27, 1966]

ORDER

For reasons stated in the Memorandum of the Court this day filed, it is ADJUDGED and ORDERED:

1. The defendants' motion to dismiss is denied;
2. The plaintiffs' prayer for an injunction restraining school construction and the purchase of school sites is denied;
3. The defendants are granted ninety (90) days to submit amendments to their plan, which will provide for employment and assignment of the staff on a non-racial basis. Pending receipt of these amendments, the court will defer approval of the plan and consideration of other injunctive relief;
4. The plaintiffs' motion for counsel fees is denied;
5. This case will be retained upon the docket with leave granted to any party to petition for further relief.

The plaintiffs shall recover their costs to date.

Let the Clerk send copies of this order and the Memorandum of the Court to counsel of record.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

January 27, 1966

**Excerpts from Minutes of Meeting of Board of,
Supervisors of Greenville County, Virginia,
November 27, 1967**

**[Defendants' Exhibit E-A to District Court
Proceedings of December 18, 1969]**

**Now, THEREFORE, be it resolved by the Board of Super-
visors of Greenville County that:**

- 1. The County of Greenville will not approve any joint
operation of the county and city school systems.**

**Minutes of Special Meeting of the Board of
Supervisors of Greenville County,
March 19, 1968**

[Defendants' Exhibit E-B to District Court
Proceedings of December 18, 1969]

"RESOLVED:

That special counsel for the County, Robert C. Fitzgerald, is hereby authorized to submit to the City of Emporia or its counsel an agreement providing for the basis of services to be provided by the County to the citizens of the City and the payment therefor, together with other matters regarding transition in the form and words as approved by this Board this date.

Be it further resolved that upon agreement on the part of the Council of the City of Emporia and the School Boards of the City and County the Chairman and Clerk of this Board are hereby authorized to execute such agreement on behalf of the County of Greenville.

Be it further resolved that if this agreement is not agreed to and executed by all parties by April 30th, all services furnished by the county to the city not required by law shall terminate.

The above is excerpt taken from the minutes of the Board of Supervisors meeting held on 19th day of March, 1968.

A Copy

Teste:

Robert C. Wrenn, Clerk

By /s/ MARY D. LEE, Deputy Clerk

**Agreement Between City of Emporia
and County of Greenville**

Dated April 10, 1968

**[Plaintiffs' Exhibit No. 7 to District
Court Proceedings of August 8, 1969]**

**THIS AGREEMENT, made and entered into this 10th day
of April, 1968, by and between:**

**The Council of the City of Emporia, Virginia, herein-
after referred to as "the City," party of the first part; and**

**The Board of Supervisors of Greenville County, Vir-
ginia, hereinafter referred to as "the County," party of the
second part; and**

**The School Board of the City of Emporia, party of the
third part; and**

**The School Board of the County of Greenville, party of
the fourth part;**

**WHEREAS, on July 31, 1967, the Town of Emporia be-
came a city of the second class by transition and thereby
became obligated by law to provide public schools for chil-
dren within its boundaries, to provide health and welfare
services and the necessary facilities therefor, to the citizens
of the City of Emporia, and**

**WHEREAS, the Code of Virginia, Section 15.1-1005 re-
quires that the costs and expenses of the Circuit Court, the
Clerk, the Commonwealth's Attorney, and the Sheriff of the
County shall be determined and apportioned as provided by
said Section, and**

*Agreement Between City of Emporia
and County of Greenville*

WHEREAS, the County of Greenville has continued to provide the citizens of Emporia with said facilities and services, and the City of Emporia is obligated to compensate the County therefor.

WHEREAS, the County of Greenville is willing to continue to provide said facilities and services to the City of Emporia for the period hereafter provided conditioned on the City of Emporia paying to the County of Greenville a proportionate share of the cost of providing said facilities and services periodically as billed.

WITNESSETH: That for and in consideration of the promises set forth hereinabove and benefits to each party hereto, the City and County agree as follows:

1. That the County will continue to provide public schools, health and welfare services through its boards and departments and necessary facilities for such to the citizens of the City of Emporia in the same manner as when the City was a town and to the same extent as provided to the citizens of the County.

2. That the City will pay to the County as billed its proportionate share of the local cost of such services and the parties agree that the City's share is 34.26 percentum of the local cost of the County. In making such computation, all federal and state funds and other funds received by the County and the City applicable to such shared expenditures shall be taken into account; provided, however, the portion of the state sales and use tax distributable to the County and City under the provisions of 58-441.43 of the Code of Virginia, shall not be considered in making such

*Agreement Between City of Emporia
and County of Greenville*

computation of local costs. Provided, however, that the City shall pay to the County 38 percentum of the debt service on the debt of the County existing on August 1, 1967, and the County agrees that if the City establishes a separate school system, that any amount paid by the City on the principal of such debt shall be credited to the City on the purchase price of any schools within the City purchased by the City.

3. The parties agree that the costs and expenses of the Circuit Court, the Clerk, Commonwealth's Attorney, and the Sheriff of the County shall be determined and apportioned as provided by Section 15.1-1005 of the Code of Virginia. The parties further agree that the City's share of such is 34.26 percentum.

4. The City agrees to pay promptly all accrued charges conforming to this Agreement and all future bills tendered by the County for services rendered in accordance with the terms of this Agreement within ten (10) days of receipt thereof. The City agrees that bills may be based on budget estimates provided that adjustment shall be made between the parties after the end of the fiscal year based on actual expenditures as shown by audit.

5. The City agrees that if any permanent improvements or additional facilities, including real property, buildings, and improvements used in providing such services to the City and County become necessary in the judgment of the County, that it will pay 34.26 per cent of the costs thereof or pay 34.26 per cent of the debt service on the costs thereof. It is agreed that the City will pay 34.26 per cent of the construction of the Training School located in the City.

*Agreement Between City of Emporia
and County of Greenville*

6. It is further agreed that on any joint capital improvement or additional facilities, including real property and improvements, purchased or made by the City and County after the execution of this Agreement, that the equity of the City and County therein shall be in proportion to their respective contributions of 34.26 per cent and 65.74 per cent.

7. It is further agreed that the parties shall hold in abeyance further negotiation or action concerning the equities and ownership of all property belonging to the County or any agency or board thereof and all funds as of the date of the transition and the equities of each in said property and funds and the debt, if any to be assumed by the City, during the continuation of this Agreement or until notice of termination. The parties agree that any determination of such matters shall be governed by the law at the time of transition of Emporia to a city of the second class.

8. The City and County agree that the provisions of this Agreement concerning the furnishing of services and payment therefor shall remain in effect for a period of four (4) years and thereafter will continue until notice is given by either party to the other by December 1 of any year upon the condition that the notice of termination shall be for the termination of the Agreement on July 1 of the second year following the giving of said notice. The parties agree that should any territory of the County be annexed to the City during the life of this Agreement, that this Agreement shall terminate on the effective date of any such annexation unless this Agreement be modified by mutual agreement of the parties prior thereto.

*Agreement Between City of Emporia
and County of Greenville*

9. The parties of the third and fourth parts join in this Agreement for the purpose of agreeing to the provisions hereof relating to school facilities and the operation of such.

IN WITNESS WHEREOF, the City of Emporia and the County of Greenville have caused this Agreement to be executed by their proper officers thereto duly authorized and their seals be affixed to this Agreement, which is executed in duplicate.

Motion for Further Relief

[filed June 21, 1968]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

The plaintiffs move that in the light of the opinion of the Supreme Court in *Green vs. County School Board of New Kent County, Virginia*, — U.S. —, 36 L.W. 4476 (No. 695 October Term 1967) decided May 27, 1968, the Court will reconsider its action herein and that thereupon the Court will require the defendant school board forthwith to put into effect a method of assigning children to public schools which will promptly and realistically convert the public schools within the jurisdiction of the defendants into a unitary non-racial system.

FURTHER, the plaintiffs move that the Court will award a reasonable fee for their counsel to be assessed as costs.

S. W. TUCKER

Of Counsel for Plaintiffs

S. W. TUCKER

HENRY L. MARSH, III

HILL, TUCKER & MARSH

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New York, New York 10019

Counsel for Plaintiffs

[Certificate of Service Omitted in Printing]

Report and Motion

[filed January 31, 1969]

IN THE UNITED STATES DISTRICT COURT**FOR THE EASTERN DISTRICT OF VIRGINIA****Richmond Division**

1. The County School Board of Greenville County, Virginia and S. A. Owen, Division Superintendent of schools, report that a thorough study of the school system has failed to alter their belief that continued operation of the freedom of choice plan, with the modifications set forth in Exhibit "A", would be in the best interest of all school age children in the county.

2. The County School Board of Greenville County, Virginia and S. A. Owen, Division Superintendent of schools, file herewith as Exhibit "A" a proposed alternative plan of reorganization of the public schools of Greenville County, which they regard as the most educationally acceptable alternative to freedom of choice.

WHEREFORE, the defendants move that the Court approve the continued use of the freedom of choice plan with the modifications set forth in Exhibit "A" or, in the alternative,

Report and Motion

that the Court approve the proposed alternative plan set forth in Exhibit "A".

Respectfully submitted,

COUNTY SCHOOL BOARD OF
GREENSVILLE COUNTY
FREDERICK T. GRAY

Of Counsel

Frederick T. Gray
Williams, Mullen and Christian
State Planters Bank Building
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

Exhibit "A"**PROPOSED MODIFICATIONS OF FREEDOM OF CHOICE PLAN**

As ordered by the Federal District Court, the Greenville County School Board has to the best of its ability studied its school needs and hereby states its intention to offer an educational program of the highest quality to every school child in its system.

During the time allotted to devise a plan of compliance with the above mentioned order, the administration, as directed by the School Board, has sought the advice of many individuals and agencies it felt were competent in dealing with matters of this nature.

Representatives of the Department of Health, Education and Welfare at both the State and National level offered suggestions. Consultants from several colleges and universities, well versed in these areas, have devoted their time and talents to help visualize more fully a program of study. School administrators in other school divisions have been most cooperative in pointing out pitfalls to be avoided in situations of this type; and specialists in various phases of curriculum representing the Virginia State Department of Education, have made worthwhile contributions to help devise a plan which would be educationally sound.

Locally each teaching vacancy which has occurred since August, 1968, has been filled with a person of a minority race with regards to the faculty and student body at the school to which assigned. In-service education classes have been established on a racially integrated basis to help teachers prepare themselves to work with students with different ethnic backgrounds.

Through all of the above, the main objective has been to plan for an educational program which best meets the needs

Exhibit "A"

of the youngsters of the Greenville County School System, and, at the same time, comply with the directives of the Federal District Court.

Additional plans call for consultation with industrial leaders, employment agencies, and civic leaders at various levels to better ascertain possible specifics of the best program to offer. To date these studies are incomplete.

At the outset, the Board wishes to affirm that the facts of this study clearly indicate that the freedom of choice plan presently in use is the only plan by which it can achieve the best possible educational results for all children regardless of race, color or national origin. Under this plan no child has been denied the right to attend the school of his choice. School records show the increasing use of interracial faculty in the school system. The high morale of the school administration, faculty, and students makes possible the excellent spirit of cooperation in existence under the freedom of choice plan.

To abandon this plan would inevitably thwart the efforts and achievements of the entire school community. In addition, students forced to leave the school of their choice would find themselves robbed of the positions and honors they had earned at their former schools.

The freedom of choice plan has produced a situation which involves peaceful integration involving more Negroes than the number in most of the Virginia counties that are totally integrated but which have a very small Negro enrollment.

In seeking to comply in the best way possible with the federal injunction, the Greenville County School Board petitions to continue its freedom of choice school plan with the following revision:

Exhibit "A"

1. That the school administrators and faculty members be permitted to counsel children and parents regarding choice of schools.

2. If substantial desegregation does not occur at the elementary level as a result of freedom of choice children will be assigned to take special classes in schools in which they will be in the racial minority. Transportation will be provided.

3. Courses offered at the two high schools will be varied to such extent that numerous students will be required to attend both facilities to obtain the courses desired.

4. Faculties will be reassigned so that there will be no less than 25% of either the white or the Negro race on the faculty of any school.

PROPOSED ALTERNATIVE PLAN

Many plans or reorganization have been considered by the Greenville County School Board and each plan which was in compliance with the Court directive had features which were educationally unsound.

However, as it was ordered to do, the Greenville County School Board has devised a plan of school reorganization which the board does not recommend over the freedom of choice plan for the reasons previously stated. If ordered to do so, however, the board will attempt to the best of its ability to administer the plan herewith presented.

HIGH SCHOOLS

The faculty at each high school will be reassigned in such manner that there will be no less than 25% of either the white or the Negro race on the faculty of either school.

Exhibit "A"

The Division Superintendent has made a detailed study of the geographical school area, the county school plant and physical facilities, the teaching and administrative personnel, and the students in the school system. Students have been or are being tested to determine the level of their intellectual ability and achievement. On the basis of this study, it has been determined that reorganization can best be accomplished by the assignment of each high school student to one of the two buildings in our system that are designed for high school curriculum offerings. This assignment will be made solely on the basis of what curriculum each student is pursuing; it will provide an equal opportunity to all school children without regard to race, color, or national origin.

The high school program will include a broad choice of curriculum offerings including college preparatory, general, vocational-technical and terminal degree categories. The academic college preparatory curriculum will be housed in one building; the vocational-technical and terminal degree curricula will be housed in the other. A student, though assigned to one of the buildings because of his curriculum choice, can elect to take a course given at the other building. General courses and physical education will be taught at both schools because neither school has the capacity to take care of the total high school needs in these areas.

If curriculum choice assignment results in overcrowding at either school the pressure will be relieved by assigning more of the general curriculum subjects to the uncrowded school plant and thereby equalize the school population in each building.

Exhibit "A"

This plan will provide the best possible instruction for each individual because each curriculum will be strengthened, and in some cases, expanded to meet needs not presently being met. New vocational subjects will be taught, and practical work experience like that presently given in Distributive Education will be given in every vocational course that lends itself to such work experience.

It is the purpose of this program to improve the training of the college bound student and at the same time to train non-college-bound students so that upon graduation they will be immediately useful to an employer in the vocation of their choice or be well qualified to enter a vocational-technical school if they choose.

This system will not accept non-resident students, nor will it make arrangements for resident students to attend schools in other school systems, where either such action would tend to preserve segregation or minimize desegregation. Any arrangement made for non-resident students to attend schools in another system will assure that such students will be assigned without regard to race, color, or national origin.

ELEMENTARY SCHOOLS

The Court having determined that Greenville County is operating a dual system composed of "white" and "Negro" students the School Board has resolved to dismantle the dual system by eliminating those factors which have caused some of the schools to be characterized as "Negro".

Faculties will be reassigned in such a manner as to destroy racial identity of the schools with a substantial degree of such reassignment being made in September 1969. (Use of specific percentages is avoided because the nature

Exhibit "A"

of the student assignment changes hereinafter set forth makes such determination extremely difficult)

Elimination of the dual system will further be accomplished commencing in September 1969 by the transfer, at attained grade levels, to former "white" schools, of individual Negro students on the basis of standardized testing of all students.

Details of the proposed plan are still the subject of study and will be made the subject of more intensive study and refinement upon approval of the general plan. The School Board would expect to file interim progress reports to the court if the broad principle is sanctioned.

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Plaintiffs' Proposed Plan for Desegregation

[filed March 18, 1969]

IN THE UNITED STATES DISTRICT COURT**FOR THE EASTERN DISTRICT OF VIRGINIA****Richmond Division**

Pursuant to direction by the Court, counsel for the plaintiffs offer the following plan for desegregation:

1. All pupils in "primary" grades (e.g., grades 1 and 2) living south of the Meherrin River will be assigned to the Zion School. All pupils in the "lower elementary" grades (e.g., grades 3 and 4) living south of the Meherrin River will be assigned to the Moton School.

2. All pupils in "primary" grades living north of the Meherrin River will be assigned to the Training School. All pupils in the "lower elementary" grades living north of the Meherrin River will be assigned to the Belfield School.

3. All pupils in the "intermediate" grades (e.g., grades 5 and 6) will be assigned to the Emporia Elementary School.

4. All pupils in the "junior" high school grades (e.g., grades 7, 8 and 9) will be assigned to the Wyatt High School.

5. All pupils in the "senior" high school grades (e.g., grades 10, 11 and 12) will be assigned to the Greenville County High School.

6. Within the foregoing basic framework, the grades to be taught at a given school may be adjusted as required by consideration for the number of pupils in certain grades and the relative capacities of the affected schools.

Plaintiffs' Proposed Plan For Desegregation

7. Special education classes will be housed in Emporia Elementary School or in such other school as space may permit.
8. Each elementary school teacher will be assigned to a school wherein will be housed the grade now being taught by her.
9. Teachers presently employed in the high schools will be assigned so that the numbers of white and Negro teachers in Wyatt School will be approximately equal and the numbers of white and Negro teachers in Greenville County High School will be approximately equal.
10. Vacancies will be filled by qualified teachers without regard to the race of the applicant or the race of the teacher previously assigned to the position.
11. There will be no distinction based on race in any of the categories of employment, in the assignment of children to classes or classrooms, or in any of the facilities or services offered in any school, including extra curricular activities.

Plaintiffs' Proposed Plan For Desegregation

Respectfully submitted,

S. W. TUCKER
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[Certificate of Service Omitted in Printing]

District Court Proceedings

[28] (June 23, 1969)

(Monday at 4 o'clock)

The Clerk: Civil Action No. 4263, Pecola Annette Wright, et al., versus the County School Board of Greenville County, et al.

S. W. Tucker and Henry Marsh, III, represent plaintiffs. Mr. Fred T. Gray represents defendants.

The Court: All right, gentlemen.

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[60] . . .

The Court: Gentlemen, I think in this case we ought to get to the findings from the Bench so we won't delay any longer.

I reserve the right to correct any grammatical errors and put in appropriate citations should it be necessary to have this typed up. This matter is a typical segregation suit which has been pending in this court since 1965. The County School Board in Greenville County, Virginia, the Court finds from the interrogatories and the admissions, had been operating their school system under what is known as a freedom of choice plan.

Shortly after the opinion of the United States Supreme Court in the Green and New Kent case this matter came on before this Court on plaintiffs' motions for further relief. That motion was filed over one year ago. Interrogatories were filed and answers to interrogatories were likewise filed.

The answers to interrogatories show that there were seven schools in the Greenville County school system. Two of the schools, Greenville County High School had 719 [61] white students and 50 Negro. The Emporia Elementary had 857 white students and 46 Negro students.

District Court Proceedings

The other five schools were composed of completely Negro student bodies. The student enrollment of 809, 552, 255, 439.

On July 10, 1968 this Court entered an order vacating the Court's order of July 8, 1968, and the matter came on before the Court. At that time, that is on July 10, 1968, this Court entered an order directing that the defendants if they could not file a report of compliance with the mandate of the principles enunciated in the case of *Green v. County School Board of New Kent County* they would file on or about August 19, 1968, a plan for desegregation of the public school system, which they contend would bring them within the requirements of the New Kent case.

This matter was brought on for hearing and the defendants were directed to file such a plan on or before the 9th of August. The defendants did file a plan called "Plan of Reorganization" dated August 8, 1968, which indicated that their preliminary studies were such that they felt compliance with the requirements of law to be attained by a geographic zoning, by a pairing of grades, by a combination of geographic zoning and pairing of grades. The School Board directed the Division Superintendent to develop a detailed plan of [62] reorganization. In short no definite plan was submitted to this Court. Just another plan of study.

This Court at that time, or shortly after receiving the report and the motions, indicated either by formal order or correspondence with counsel, or discussion with counsel that the Court would not insist upon a plan to be effective as of this past September, feeling that the time was too close, and particularly in view of the fact that the Superintendent of Schools had just assumed his responsibilities in Greenville County. A plan was finally, after one or

District Court Proceedings

two delays at the request of the defendants, was filed some time, I believe, in February, 1969.

That plan asks the Court to approve the continued—as a matter of fact in January 31, 1969, the School Board's plan was to ask this Court to approve the freedom of choice plan with certain minor modifications.

On March 18 plaintiffs submitted a proposed plan for desegregation. The Court heard the testimony on February 25, 1969, at the behest of the defendants at which Mr. Owen testified and Mr. Stone and Dr. Curtis G. Kisse, who testified as to certain testing procedures that could be used and the effects of the results of the tests, but no results were had at that time. There wasn't anything for the Court to give [63] any consideration to and the matter was continued to the end that the defendants could make their tests as suggested by Dr. Kisse and report to the Court with definitive figures.

On June 5 this Court ordered a hearing for this day for the purposes of considering the defendants' report. The Court finds that defendants suggest a plan which would substitute a segregated—one segregated school system for another segregated school system and that is all it is.

The Court has no confidence whatsoever in the testing procedures that apparently were used in this instance, based solely upon the numbers and based upon the testimony of Mr. Owen to the effect that one of the large facets in connection with this proposed plan is the securing of certain Federal funds that are given to people who are economically depressed. It is fairly obvious from the testimony here that if a little over 50 per cent of the population of Greenville County are in that economic situation that any meaningful plan of desegregating the schools will not preclude the county from securing these funds, but even if it did that is

District Court Proceedings

not constitutionally viable and there is no reason to delay the desegregation of schools, with little hope from what this Court sees from these figures, and I am disappointed in it because I thought I had bent over backwards with Greenville County, and [64] I thought they were going to come up with a meaningful plan, but it is patently obvious to this Court that a substitution of one segregated system for another segregated system will not work, and the Court so finds.

The Court finds that the suggestion that a vocational school be commenced is in fact for the purpose of continuing a segregated system of schools as evidenced by the report that any such school system would contain, or any such school would contain, I believe—let me get the figures correct—the following student population. I might as well go through all of them. Emporia Elementary School is contemplated would have 549 white students and 281 Negro students for a total student body of 830.

Zion would have 227 white students and 111 Negro students. The training school would have 41 white students and 399 Negro students. Belfield would have 39 white students and 313 Negro students. Moton would have 47 white students and 462 Negro students.

In the secondary school system Wyatt would have 800 Negro school population and 140 white. The other high school, which would presumably have the college course, would have 472 white and 175 Negro.

The Court finds that the purpose of that is to [65] put in effect the tracking system that was criticized by Judge Skelly Wright in the decision by his court.

The Court rejects the plan as being not constitutionally permissible in accordance with the Green case.

District Court Proceedings

The Court directs therefore that the proposed plan of desegregation submitted by the plaintiffs is to be put in effect and a mandatory injunction directing the School Board to put that plan in effect commencing September would be entered.

Now, the Court will consider any amendments to it so as not to preclude a better plan, but so there is no further delay and so we don't come up in August and say, "Well now, we have got a plan but can't do it for a year," the School Board is directed today, now, to commence their work to do whatever is necessary to put in effect the plan for desegregation submitted by the plaintiff.

Thank you, gentlemen.

(The hearing in the above matter was concluded at 5:15.)

Order of District Court

[filed June 25, 1969]

For the reasons stated from the bench at the conclusion of the hearing on June 17, 1969, and deeming it proper so to do,

It is ADJUDGED, ORDERED and DECREED:

1. That defendants' proposed use of the freedom of choice plan with the modifications set forth in Exhibit A be, and the same is hereby, denied.

2. That the defendants' proposed use of the alternative plan set forth in Exhibit A be, and the same is hereby, denied.

It appearing to the Court that the defendants have failed to submit a proposed plan for the assignment of students in accord with the principles contained in the case of *Green v. County School Board of New Kent County*, it is ADJUDGED, ORDERED and DECREED that:

1. The defendants herein, their successors, agents and employees, be, and they hereby are, mandatorily enjoined, permanently, to disestablish the existing dual system of racially identifiable public schools being operated in the County of Greenville, Virginia, and to replace that system of schools with a unitary system, the components of which are not identifiable with either "white" or "Negro" schools.

2. The Court having considered the proposed plan for desegregation filed by the plaintiffs herein, and being of the opinion that same will lead to a unitary system of schools, the components of which are not identifiable with either "white" or "Negro" schools, the defendants herein,

Order of District Court

their successors, agents and employees, be, and they hereby are, mandatorily enjoined to take the necessary steps to the end that the proposed plan for desegregation filed by the plaintiffs with the Court under date of March 18, 1969, be put into effect commencing with the school term beginning in September 1969.

3. The defendants are ordered and directed to report to this Court by no later than August 15, 1969, their actions in compliance with this decree, including therein the anticipated racial composition of the student bodies of each school being operated by the defendants in Greensville County, Virginia, as well as the racial composition of the teachers in each of the schools aforesaid.

Let the Clerk send copies of this order to all counsel of record. It is further ordered that copies of this order be served by the United States Marshal on each of the defendants herein.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

June 25, 1969.

**Letter from Council of the City of Emporia to Hon.
Rufus Echols, Chairman and Members of Greenville
County Board of Supervisors Dated July 7, 1969**

[Plaintiffs' Exhibit No. 6 to District Court Proceedings
of August 8, 1969]

The Honorable Rufus Echols, Chairman and Members of Greenville County Board of Supervisers; The Honorable Adolphus Slate, Chairman and Members of Greenville County School Board; and H. B. Vincent, Esquire, Commonwealth's Attorney

Gentlemen:

In 1967-68 when the then Town of Emporia, through its governing body, elected to become a city of the second class, it was the considered opinion of the Council that the educational interest of Emporia Citizens, their children and those of the citizens and children of Greenville County, could best be served by continuing a combined City-County school division, thus giving students from both political subdivisions full benefits of a larger school system.

The Council was not totally unaware of a Federal Court suit against Greenville County existing at that time, regarding school pupil assignments, pupil attendance, and etc., but they did not fully anticipate decision by the court which would seriously jeopardize the scholastic standing and general quality of education affecting City students attending the combined school system.

The City Council's action, in remaining in the combined school system, was taken with sincere intent of cooperation, in good will and in order not to prejudice the Federal Court case. This action delayed the urgency for a division of County assets, monies or other property of value as provided by law.

Letter from Council of the City of Emporia

The pending Federal Court action, at the time of Emporia's transition from a town to city, was finally decided by the court on June 23, 1969. The resulting order REQUIRES massive relocation of school classes, excessive bussing of students and mixing of students within grade levels with complete disregard of individual scholastic accomplishment or ability.

An in-depth study and analysis of the directed school arrangement reflects a totally unacceptable situation to the Citizens and City Council of the City of Emporia. The directed plan becomes even more unpalatable when the school records reflect those students of the City who attend the combined school system are not contributing to the "inbalance" which apparently led the court to order school class relocations, bussing and etc.

The court decision, school enrollment figures, public laws and other information concerning public schools, is not restricted to the eyes of governmental or political officials. Such facts, and possible reaction measures or avenues of relief, are well known to responsible citizens, both within and without the City. The City Council cannot escape their responsibilities to the Citizens and taxpayers of the City; they must concern themselves primarily with the best means possible to provide quality education, at reasonable costs, for their children.

Various approaches to the problem have carefully been explored and after very serious discussion, the Mayor and Council have unanimously concluded that the City can best discharge its duty and responsibility to educate the children of Emporia by a City School System which shall be established as a unitary system, the components of which are not identifiable with either white or black schools, effective August 1, 1969.

2

Letter from Council of the City of Emporia

The Council realizes it is incumbent upon them to take this only logical course open to them; this action is done with extreme reluctance and sincere compassion for the Citizens, School Board and Governing Body of Greensville County. It is anticipated there will be complete cooperation between the governing bodies and administering school boards for the common good of all citizens.

In unofficial, preliminary joint City-County conferences, the mechanics regarding establishment of a City School System were discussed and more particularly, how a division would affect City-County financial agreements, the geographical lines of the political subdivisions and student school distribution. In these preliminary meetings, the City expressed a sincere need for an increase in its geographical boundaries through extensive annexation in order to provide an adequate tax basis to support an independent school system. The Council is of the opinion annexation of portions of land beyond the City Limits is most desirable in the interest of the people involved and the City. A careful preliminary study, including all facets of school operation and with particular attention to objections raised by County Officials, has been conducted and the facts indicate that it may be feasible to operate a City School System without immediate annexation.

To offset the revenue loss resulting from refraining from immediately initiating annexation procedures, however, existing unresolved City-County financial division, property division and other unsettled matters must be adjusted without delay to effect an orderly effective and economical transition of school affairs.

The following matters are considered urgent, and it is respectfully proposed:

- I. The existing City-County agreement for joint services be terminated in the best cooperative manner.

Letter from Council of the City of Emporia

- II. Re-negotiate a new City-County agreement between the governing bodies excluding contractual school arrangements and establishing a procedure for an equity settlement as provided hereafter.
- A. Continue present agreement providing for existing expense-sharing formula for the offices of Commonwealth's Attorney, Sheriff, Clerk, Courts and Judges, Agricultural Services, Welfare Services, and Jail Services on present basis.
 - B. Add that contractual fire services shall be provided by the City to the County on the same percentage basis.
 - C. Adjust "Buildings and Grounds" portion to provide City participation in office expense of only those offices shared by City and County.
 - D. Provide for an immediate adjustment procedure to contractual arrangement as a result of:
 - 1. Decennial Federal Census
 - 2. Annexation or de-annexation by local enumeration procedures
 - 3. Request of either governing body for an enumeration at their expense, at any time
 - E. Include procedure for equity settlement, authorizing:
 - 1. Joint employment of a Certified Public Accountant, independent of official City or County association, to determine financial equity of both governing bodies in fund balances and other monies held by the County at time of City transition.

Letter from Council of the City of Emporia

2. Joint employment of a professional appraisal organization, independent of any City or County association, to determine values (and required adjustments thereto) of real and personal property held by the County and/or School Board at the time of transition.
- III. Transfer immediately, title of all real school property together with School furnishings and equipment contained therein, in the Corporate Limits from the County and/or School Board to the City of Emporia.
- A. Any adjustments in equitable ownerships after appraisal as provided in E-2 above to be mutually agreed upon.
- IV. The City will accept on a first come, first serve, no transportation basis, any and all students residing in Greensville County who wish to complete or continue their education in City schools. Out-of-City students will be required to pay a tuition fee, based on present pupil operating cost, less financial aids collectible from the Commonwealth.

CITY COUNCIL OF THE CITY OF EMPORIA

Minutes of City Council. July 9, 1969

**Minutes Of The Council Of The City Of Emporia
For July 9, 1969 And July 14, 1969**

July 9, 1969

The City Council of the City of Emporia met in special meeting at 7:30 P.M. on the above date in the Council Chamber of the Municipal Building with Mayor George F. Lee presiding. The following members of Council were in attendance and answered to the roll call:

William H. Ligon
L. R. Brothers, Jr.
T. Cato Tillar
Fred A. Morgan

Julian C. Watkins
S. G. Keedwell
M. L. Nicholson, Jr.
Robert F. Hutcheson

Also present were: D. Dortch Warriner, City Attorney
Robert K. McCord, City Manager

The Mayor appointed the City Manager as Acting Clerk for the meeting and then announced the purpose of the meeting was for "establishing a City School System." On motion by Mr. Brothers which was seconded by Mr. Morgan, the Council unanimously moved to convene in Executive Session. A motion by Mr. Tillar which was seconded by Mr. Keedwell was unanimously passed on roll call vote that the Council re-convene into the special meeting. A brief discussion of school matters was held, after which Mr. Hutcheson's motion which was seconded by Mr. Morgan was unanimously adopted that "the City Council of the City of Emporia have a special meeting, Monday, July 14, 1969, 7:30 P.M. in the Council Chamber of the Municipal Building and take final action on the establishment of a City School System."

There being no further business, the meeting adjourned.

GEORGE F. LEE, Mayor

Robert K. McCord, Acting Clerk

Minutes of City Council, July 14, 1969

July 14, 1969

The City Council of the City of Emporia met in special meeting at 7:30 P.M. on the above date in the Council Chamber of the Municipal Building with Mayor George F. Lee presiding.

The following members of Council were in attendance and answered to the roll call:

William H. Ligon
L. R. Brothers, Jr.
T. Cato Tillar
Fred A. Morgan

Julian C. Watkins
S. G. Keedwell
M. L. Nicholson, Jr.
Robert F. Hutcheson

Also present were: D. Dortch Warriner, City Attorney
Robert K. McCord, City Manager
Nell M. Mitchell, City Clerk

Mayor Lee called the meeting to order and welcomed the citizens. Mayor Lee stated this is a very important meeting, and the Council has been meeting constantly in the past week. The purpose of the meeting is to take action on the establishment of a City School System, to try and save a school system for the City of Emporia and Greensville County. It is most important to maintain a public City School System and a superior school system for the approximately 1400 students inside the City. The Mayor said, "when Emporia became a City of Second Class, we could have taken on our school system, but we entered into an agreement with the County." Mayor Lee also stated, "it's ridiculous to move children from one end of the County to the other end, and one school to another, to satisfy the whims of a chosen few." He said, "The City of Emporia and Greensville County are as one, we could work together, to save our school system."

Minutes of City Council, July 14, 1969

Mayor Lee told the citizens that the City School Board was Represented by E. V. Lankford, Jr.

Mr. McCord then read a report from the committee appointed to study a suit entered by H. L. Townsend.

Mr. Lankford gave a plan based on Judge Merhige's ruling, and percentages of Negroes in each school for the first seven grades.

Mayor Lee explained that the City's total enrollment of students is 31% and we are paying 34.64% of the school budget, plus 38% of School Debt. In his opinion a City School System wouldn't cost any more, and we could take in County Students on a tuition basis.

Mayor Lee then read a letter from County Board of Supervisors as follows:

"Your letter of 10 July 1969 has been received and thoroughly considered by the Board of Supervisors.

As you are aware, the Greenville County School Board is presently under Federal Court order to place county and city students in all schools owned by the county in accordance with the plan adopted by the Court.

The Board of Supervisors for Greenville County and the School Board for the County are advised that they are legally obligated to provide all school facilities for the county children, and the city children, if they elect to attend, in order to comply with the court order.

Therefore, it will be impossible for the Board of Supervisors and the School Board to sell, or lease, the school buildings situate within the City without placing themselves in contempt of the Federal Court order.

This is the legal position we have been placed and until the Court order has been altered, amended or vacated, we cannot honor your request to convey the school buildings to the City."

Minutes of City Council, July 14, 1969

City Attorney Warriner stated that we have requested the County to give us title or lease to us the three schools in the City Limits.

The County advised us, according to law there is still an unitary school system and they had to comply with the law. Mr. Warriner also stated that it is the feeling of Council that it would be a step forward to have our City School System, and the decision must be made by Council.

A discussion followed concerning the termination of the contract with the County. Mr. Warriner pointed out the contract could be terminated through mutual agreement of both parties, or annexation by the City.

Councilman Morgan stated that he had talked over this situation with citizens and also the Board of Supervisors, and he sincerely believes the Board would like to cooperate but are in a bind. He would suggest annexation, or work out something together to terminate the contract.

Mr. William Robinson, a county resident, appeared before Council and told them a meeting was held with residents of the county from three districts and presented a resolution to the County Board of Supervisors for them to work out a negotiable agreement with the City on the school situation. Mr. Robinson said, "the County Board replied they couldn't work out anything right now."

After a discussion on the City's equity in the schools, Councilman Watkins stated he agreed wholeheartedly, we do have equity.

Councilman Keedwell stated we all realize and are concerned about quality of education. Mr. Keedwell also stated that going to City School System would be better than the system proposed by the Judge. Councilman Keedwell said "if annexation is unopposed by County, we could reasonably assume the effective date to be January 1, 1970, which is 4 months of school. We have to do something now to be ready by Sept. 1."

Minutes of City Council, July 14, 1969

Mr. Warriner pointed out that the City should attempt by all means to obtain possession of school buildings in the City to start school in September.

Councilman Morgan stated we are under an injunction right now to provide schools for City children.

Councilman Brothers stated that equity should be established immediately to determine what is rightfully ours.

Mr. C. E. Saunders, a city resident, said, "if we have to wait until January to start school, we would be better off." He has three children going in three directions, 2 miles apart under the present court order.

Councilman Morgan said, "let's start something tonight."

Councilman Keedwell stated we could use temporary buildings if it means temporary buildings.

Mr. Don Tillar, a city resident, stated the City Council is concerned about the welfare of city and county children, when we go out of here we've got to sell the idea to all the people.

Mr. Lankford, Chairman of the City School Board, explained we could go in two directions:

1. To ask State Board of Education to create a division of City and County Schools and share School Superintendent, or
2. Ask State Board of Education to create separate school division and we have our own school Superintendent.

Mr. Lankford also told the Council that under a planned budget that approximately 500 county children could attend city schools if the city obtained the buildings wanted. He stated with temporary buildings the greatest problem would be equipment, and there would be no room for students from the county.

Minutes of City Council, July 14, 1969

After further discussion, a motion made by Councilman Ligon, that the City School Board be instructed to immediately take all steps to establish a school division for the City of Emporia, and that the City Attorney be instructed to take immediate steps to determine the equity of the City of Emporia in all property, including cash, in which the City and County of Greensville have joint ownership. His motion was seconded by Councilman Morgan and on roll call vote was passed by all eight (8) members of Council voting aye.

There being no further business the meeting was adjourned.

George F. Lee, Mayor

Nell M. Mitchell, City Clerk

**Minutes of Meeting of County School Board
of Greenville County, July 16, 1969**

[Plaintiffs' Exhibit No. 1 to District Court
Proceedings of August 8, 1969]

A called meeting of the County School Board of Greenville County was held in the school board office on Wednesday, July 16, 1969 at 11:00 o'clock.

Members present—Adolphus G. Slate, Chairman
Landon S. Temple
Dr. J. B. Adams
Billy B. Vincent
Supt. S. A. Owen, Clerk

Mr. Fred Gray, school board attorney, Mr. Benjamin Vincent, Commonwealth's Attorney, and Mr. Rufus Echols, chairman of Greenville County Board of Supervisors were also present.

The Board reconsidered plans approved on July 8, 1969 and instructed Adolphus G. Slate, chairman of School Board to release the following information:

During the past several days there have been a number of statements made and rumors circulated regarding the future of the Greenville County Public Schools including those in the City of Emporia.

The Greenville County School Board, in order to clarify the situation and set the record straight as to its actions and intentions issues the following statement:

1. It has been and will continue to be the intention of the Greenville County School Board to provide the highest quality education possible to every child in Greenville County and Emporia.

*Minutes of Meeting of County School Board
of Greeneville County, July 16, 1969*

2. On June 25, 1969, Judge Robert R. Merhige, Jr. of the United States District Court of the Eastern District of Virginia entered an order directed to the School Board *and their successors* requiring them to "dis-establish the existing dual school system" and to put into effect in September the plan proposed by the attorneys for the N.A.A.C.P.
3. The School Board has instructed its attorney to appeal from the order of June 25, 1969.
4. Immediately after June 25, 1969 the School Board considered the N.A.A.C.P. plan and determined that it is impractical and immediately began a study of a plan to desegregate the schools which will comply with the court's order that the board "disestablish the existing dual school system" but at the same time be practical in operation.
5. The School Board has now completed its study and has prepared a plan for the operation of the schools for all of the children in Greensville County and the City of Emporia. The Board will request the District Court to approve this plan and substitute it for the N.A.A.C.P. plan. This request will go forward as soon as the court can hear the matter.
6. The School Board has been advised that the City of Emporia is taking steps to set up a separate school system for the children of Emporia and, on a tuition basis, for all children of Greensville County who desire to attend the Emporia School System to the extent that the facilities will accommodate them.

*Minutes of Meeting of County School Board
of Greenville County, July 16, 1969*

7. The School Board of Greenville County fully understands the motives of those seeking to establish a separate system for Emporia and will not attempt to interfere with their activities since it is apparently their sincere belief that they are acting in the best interest of the children of Emporia, however, because this Board believes that such action is not in the best interest of the children in Greenville County we cannot and we will not assist in the separation of the school system, we have not and presently do not plan to transfer any school facilities to the City and we have not and will not agree to dissolve the contract now existing between the County and the City.
8. It is the opinion of the School Board that until the State Board of Education creates a separate school district this school board is responsible for the education of all children in the County and the City.

Minutes of City School Board, July 17, 1969

Minutes Of The School Board Of The City Of Emporia For July 17, 1969

The Emporia School Board met on the above date in the City Manager's office in the Municipal Building at 4 P.M. with Chairman E. V. Lankford, Jr. presiding.

The following members were present and answered to the roll call:

E. V. Lankford, Jr., Chairman
G. B. Ligon
Julian Mitchell
Robert K. McCord, Acting Clerk

Chairman Lankford reported to the School Board on recent activities of a Council appointed committee to study City school matters, the committee consisting of Mayor George Lee, the City Attorney, Mr. Dortch Warriner, City Manager, Mr. Robert McCord, and himself.

In his report, Mr. Lankford advised the board that the final action of the committee was reported to the City Council on Monday, July 14, 1969; after which the following motion was unanimously adopted by the City Council:

"A motion made by Councilman Ligon, that the City School Board be instructed to immediately take all steps to establish a school division for the City of Emporia, and that the City Attorney be instructed to take immediate steps to determine the equity of the City of Emporia in all property, including cash, in which the City and County of Greensville have joint ownership."

In view of the action of the City Council, Mr. Lankford requested the reaction of the School Board and after a com-

Minutes of City School Board, July 17, 1969

plete discussion the following resolution, introduced by Mr. Ligon, seconded by Mr. Mitchell was unanimously passed by the City School Board.

THAT WHEREAS by motion unanimously adopted by the City Council for the City of Emporia on Monday, 14 July 1969, the School Board for the City of Emporia was directed to take all necessary and proper steps to establish a school division for the City; and

WHEREAS the Board is of the unanimous opinion that the future well-being of the children of this community requires that the Board proceed immediately to establish such a school division; and

WHEREAS it is the considered opinion of the Board that the requirements under the decree of the Federal District Court for the Eastern District of Virginia in a suit to which the County of Greensville is a party will result in a school system under which the school children of the City of Emporia will receive a grossly inadequate education; and

WHEREAS under the decree aforementioned, there will be substantial overloading of certain school buildings and substantial underuse of other school buildings at an excessive cost to both the County and the City, the cost of school transportation will be exaggerated out of all need in that pupils will be assigned to schools on a basis other than that of proximity, the City's contribution toward education will be substantially increased without any additional benefit in education to its children, and the School Board has been sued by certain taxpayers and students of the City of Emporia to prevent such disruption of the educational processes; and

WHEREAS it is the duty and responsibility of the Board to provide to the children of the City an efficient school system in which they may obtain quality education;

Minutes of City School Board, July 17, 1969

WHEREAS it is a considered belief of the Board that this can be accomplished only by means of a separate school division for the City of Emporia.

NOW THEREFORE be it RESOLVED by the School Board for the City of Emporia, Virginia, in special session assembled this 17th day of July, 1969, that the State Board of Education favorably consider this application for the creation of a separate school division for the City of Emporia, Virginia, so as to enable the Board to proceed promptly to furnish public education to the students of the City of Emporia in the fall of 1969.

Chairman Lankford was authorized to seek an immediate meeting with the State Department of Education to present the above resolution and other resolutions of the City Council.

A brief discussion was continued regarding registration and the dates of July 28 through August 1 were established as tentative dates for registration for City Schools.

/s/ E. V. LANKFORD, JR.
Chairman

/s/ ROBERT K. McCORD
Clerk

Minutes of City Council, July 23, 1969

Minutes Of The Council Of The City Of Emporia For July 23, 1969

The City Council of the City of Emporia met in special meeting at 12 Noon on the above date in the Council Chamber of the Municipal Building with Mayor George F. Lee presiding.

The following members of Council were in attendance and answered to the roll call:

Julian C. Watkins
Lyman R. Brothers, Jr.
T. Cato Tillar
M. L. Nicholson, Jr.
Fred A. Morgan
Robert F. Hutcheson

Also present were: D. Dortch Warriner, City Attorney
Robert K. McCord, City Manager
Nell M. Mitchell, City Clerk

Mayor Lee stated the purpose of the meeting is to consider and adopt a resolution to be presented to the State Board of Education.

Mr. McCord read the following resolution:

THAT WHEREAS THE City of Emporia is a City of the second class situate entirely within the County of Greenville; and

WHEREAS THE City contains approximately 1,400 school children who have heretofore been enrolled in the public schools of Greenville County under a contractual arrangement under which the City shares in the cost of the schools but does not participate in the management thereof; and

WHEREAS as a result of recent decisions in a case pend-

Minutes of City Council, July 23, 1969

ing before the Federal District Court for the Eastern District of Virginia in which the County School Board for Greensville County is a party, the residents of Emporia do not believe that the County will be able to furnish school children an acceptable level of education; and

WHEREAS Council concurs in this opinion and is willing to assume its primary obligation to provide the children residing within the City of Emporia a secondary education; and

WHEREAS certain taxpayers and school children of the City of Emporia have filed suit to require the City to proceed immediately to establish a separate school division for the reasons, among others, that the City has no control over the function of the school division and that City school children will be bussed out of the City to attend classes; and

WHEREAS it is the firm intent and purpose of the Council to provide the best possible education to all the children of the City in complete compliance with the letter and the spirit of the Constitution of the United States and all applicable decisions of the Federal Courts interpreting the same; and

WHEREAS the Council has reached the conclusion that a failure on the part of Council to take all necessary and proper action to establish a separate school division would adversely affect the prosperity, growth and vitality of the community in a most serious degree; and

WHEREAS the intent of the Council to establish a separate school division has the near unanimous support of the citizenry of the City of Emporia and it is deemed necessary and essential that the City proceed immediately to that end.

NOW THEREFORE be it RESOLVED by the City Council for the City of Emporia in special session assembled this 23rd day of July, 1969, that the State Board of Education be, and it hereby is, respectfully requested to authorize the creation of a school division for the City of Emporia,

Minutes of City Council, July 23, 1969

Virginia, in order that a public school system may be instituted in the fall of 1969.

After brief discussion, a motion was made by Councilman Morgan to adopt the resolution as read and that it be forwarded to the State Board of Education. His motion was seconded by Councilman Tillar and unanimously passed.

There being no further business the meeting adjourned.

GEORGE F. LEE

Mayor

NELL M. MITCHELL

City Clerk

Motion to Amend Judgment

[filed July 23, 1969]

IN THE UNITED STATES DISTRICT COURT**FOR THE EASTERN DISTRICT OF VIRGINIA****Richmond Division**

The County School Board of Greensville County, Virginia moves that the Court amend paragraph 2 of the order entered herein on June 25, 1969 for the following reasons:

1. The plan submitted by the plaintiffs and approved by the Court is unduly disruptive, would require transportation facilities not currently available and over-crowds some schools.
2. The defendants submit herewith a plan which will provide a unitary school system, eliminates the unnecessary movement of children and make a more efficient use of existing facilities.

(See exhibits A and B)

Wherefore, the defendants move that the plan herewith submitted be approved and the judgment amended to accomplish that result.

Motion to Amend Judgment

Respectfully submitted,

COUNTY SCHOOL BOARD OF
GREENSVILLE COUNTY, VIRGINIA
FREDERICK T. GRAY

of counsel

Frederick T. Gray
Williams, Mullen and Christian
Courthouse Square
Chesterfield, Virginia, 23832

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[Certificate of Service Omitted in Printing]

Exhibit "A"**PLAN FOR OPERATION OF UNITARY SCHOOL SYSTEM BY
GREENSVILLE COUNTY SCHOOL BOARD**

All children attending schools of Greenville County School Board will be assigned in accordance with the following plan commencing with the opening of schools in September, 1969.

- I. All children attending grades 10, 11 and 12 will attend Greenville County High School.
- II. All children grades 8 and 9 will attend former Wyatt High School.
- III. All children in grades 1 through 7 will attend school according to the following zones (see map attached Exhibit B)
 - a. Moton Elementary School—all children residing in Hicksford Magisterial District.
 - b. Greenville Training School—all children North of but not on Route 58 and East of but not on Route 301.
 - c. Emporia Elementary School—all children living in the City of Emporia and not within the zone of Training School and all children living East of Route 301 and along and South of Route 58 and not within Hicksford Magisterial District.
 - d. Belfield Elementary School—all children in Nottoway Magisterial District and all children in Belfield Magisterial District not included in the Greenville Training School or Emporia Elementary School Zone.

Exhibit "A"

IV. Special Education Classes will be offered as required at the Zion Elementary School facility.

V. Faculties shall be completely integrated and Board will report to the Court on or before August 15, 1969 the proposed racial composition of the faculty at each school.

[Exhibit "B" Omitted in Printing]

Minutes of City School Board, July 30, 1969

Minutes Of The School Board Of The City Of Emporia For July 30, 1969

The Emporia City School Board met in the City Manager's office on the above date. The following members were present and answered to the roll call:

Mr. E. V. Lankford, Jr., Chairman

Mr. G. B. Ligon

Mr. Julian Mitchell

Dr. Paulus Taylor

Mr. Robert K. McCord, Acting Clerk

Mr. E. R. Reidel was also present.

Chairman Lankford reported to the School Board on various activities which have taken place in the school matters since the last meeting, July 16, 1969.

Mr. Lankford described the meeting held in Richmond with the State School Board, State Superintendent, and Administrative Personnel. He advised the Board that the resolution of the School Board, adopted on July 16, 1969, was presented to the State Board of Education, together with a similar resolution from the City Council.

Mr. Lankford advised no final action on our petition would be forthcoming from the State until after their regular meeting August 18, 1969. He did, however, note that Emporia is at the present time a separate school district in all phases except that the existing plan of operation requires joint participation, both financially and administratively, in the office of the local School Superintendent.

Mr. G. B. Ligon exhibited the proposed school registration forms to be used for the year 1969-70. Doctor Taylor submitted a list of volunteers to assist in the registration, as did Mr. Ligon.

Minutes of City School Board, July 30, 1969

A motion prevailed that the school registration take place from August 4 through 8, 1969. Registration is to take place in the Municipal Building between the hours of 9 A.M. and 5 P.M.

The Board discussed the possibilities and probabilities of temporary school facilities for use in the event the city was not successful in obtaining adequate existing school buildings or equipment. The acting clerk was instructed to contact the local churches and to investigate available vacant buildings for use as educational facilities.

There being no further business the meeting was adjourned.

/s/ E. V. LANKFORD, JR.
Chairman

/s/ ROBERT K. McCORD
Clerk

Plaintiffs' Exhibit No. 23

Notice—Re: Registration for City School Pupils

CITY OF EMPORIA
MUNICIPAL BUILDING
EMPORIA, VIRGINIA 23847

July 31, 1969

TO: ALL CITIZENS AND RESIDENTS OF THE
CITY OF EMPORIA

School registration for the 1969-70 season will be held at the Municipal Building on Budd Street during the week of August 4-8, 1969. Registration will be held daily between the hours of 9 A.M. and 5 P.M.

All parents, with school age children, residing in the City of Emporia *MUST* register their children during this period, even though they may have attended school in previous years.

Children who will be six (6) years of age on or before *October 1, 1969*, will be eligible for first grade registration. Those who will be six (6) years of age after October 1, 1969 will not be eligible. Immunization records and birth certificates *MUST* be made available for registration of first grade children.

Applications for out-of-City students who desire to attend Emporia City Schools on a tuition, no transportation basis, will also be received during the week of August 4-8, 1969. Required information for this group will be the same as for City students.

If there are any questions, please call 634-3332 prior to registration date.

Very truly yours,

CITY OF EMPORIA SCHOOL BOARD

IT IS REQUESTED THAT COMMERCIAL AND INDUSTRIAL EMPLOYERS PLEASE POST THIS LETTER ON THEIR PERSONNEL BULLETIN BOARD.

Order of District Court

[filed August 1, 1969]

This day came the plaintiffs by counsel pursuant to notice to the defendants and moved the Court for leave to file a supplemental complaint and to add parties defendant.

It is ORDERED that said supplemental complaint be filed and that a copy thereof, together with a copy of the original complaint herein, a copy of the Court's order herein entered on June 25, 1969, and a copy of this order be served on each of the additional defendants named in the Supplemental Complaint, viz: the Council of the City of Emporia, George W. Lee, S. G. Keedwell, L. R. Brothers, Jr., William H. Ligon, Julian C. Watkins, T. Cato Tillar, M. L. Nicholson, Jr., Fred A. Morgan, The School Board of the City of Emporia, E. V. Lankford, Julian P. Mitchell, P. C. Taylor, and G. B. Legon, all of whom are made parties defendant hereto.

The said defendants shall answer said supplemental complaint within 15 days after service thereof. The plaintiffs' motion for interlocutory injunction is set for hearing on August 8, 1969, at 10:00 A.M.

Enter this 1st day of August, 1969.

/s/ ROBERT R. MERHIGE, JR.

UNITED STATES DISTRICT JUDGE

Supplemental Complaint

[filed August 1, 1969]

IN THE UNITED STATES DISTRICT COURT**FOR THE EASTERN DISTRICT OF VIRGINIA****Richmond Division**

1. The original complaint herein filed on March 15, 1965, is by this reference made a part hereof.

2. The City of Emporia is a city of the second class and is located entirely within the boundaries of the County of Greensville. George W. Lee is the Mayor of the City of Emporia; S. G. Keedwell, L. R. Brothers, Jr., William H. Ligon, Julian C. Watkins, T. Cato Tillar, M. L. Nicholson, Jr., and Fred A. Morgan are members of the Council of the City of Emporia.

3. E. V. Lankford, Julian P. Mitchell, P. C. Taylor, and G. B. Ligon are members of and collectively constitute The School Board of the City of Emporia.

4. During and prior to the 1968-69 school session, and at all times during the pendency of this action, the County School Board of Greensville County operated the public school system for all children of public school age residing in the County of Greensville, including those residing in Emporia; the City of Emporia, since its incorporation in 1967, having contributed its proper share of the budget of the County School Board. The School Board of the City of Emporia has never operated public schools. Prior to its incorporation as a city, the town of Emporia was not a separate school district and was not separately represented on the County School Board of Greensville County.

Supplemental Complaint

5. By order herein, dated and filed June 25, 1969, the County School Board of Greenville County was enjoined to disestablish the dual system of racially identifiable public schools being operated in the County of Greenville and to replace that system of schools with a unitary system, the components of which are not identifiable with either "white" or "Negro" schools. Said order further directed said County School Board to put into effect commencing with the school term beginning in September 1969, a certain plan by which children would be assigned to public schools located in the County of Greenville and in the City of Emporia according to the respective grades of said children and in some instances the location of their residences, and in all events without regard for their race.

6. After the entry of said order, to-wit, on July 30, 1969, this Court ruled that the said plan would be modified so as to require the County School Board to assign children to public schools located within the County of Greenville or to public schools located within the City of Emporia in accordance with the attained grades of the children, viz:

<i>Grades</i>	<i>School</i>	<i>Location of Such School</i>
1-2-3	Emporia Elementary	City of Emporia
4-5	R. R. Moton Elementary	County of Greenville
5-6	Belfield Elementary	County of Greenville
7	Zion Elementary	County of Greenville
8-9	Junior High	County of Greenville
10-11-12	Senior High	City of Emporia
Special Education	Greenville County Training	City of Emporia

Supplemental Complaint

7. After the entry of said order of June 25, 1969, the Council of the City of Emporia determined that it will no longer contribute to the budget of the County School Board of Greensville County and Council directed the School Board of the City of Emporia to establish and operate public schools for children of school age residing within the City of Emporia.

8. Withholding of funds by the Council of the City of Emporia from the County School Board of Greensville County and execution of the Council's directive by The School Board of the City of Emporia will frustrate the execution of this Court's order and the efforts of the County School Board of Greensville County to implement the above mentioned plan for the operation of the public school system which heretofore has served children residing in the County of Greensville and children residing in the City of Emporia.

WHEREFORE, the plaintiffs pray that, pending this Court's further order, the Council of the City of Emporia and the members thereof and the School Board of the City of Emporia and the members thereof be joined as parties-defendant and be restrained and enjoined forthwith from establishing a system of public schools in the City of Emporia other than that heretofore established and operated by the County School Board of Greensville County and from doing any act which will prevent or interfere with the operation of public schools located within the County of Greensville or

Supplemental Complaint

within the City of Emporia by said County School Board in accordance with the orders of this Court.

HENRY L. MARSH III
Of Counsel for Plaintiffs

S. W. TUCKER

HENRY L. MARSH, III

HILL, TUCKER & MARSH

214 East Clay Street

Richmond, Virginia 23219

JACK GREENBERG

JAMES M. NABRIT, III

10 Columbus Circle, Suite 2030

New York; New York 10019

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[Jurat Omitted in Printing]

**Minutes of Meeting of School Board of
City of Emporia—August 5, 1969**

[Plaintiffs' Exhibit No. 23, to District Court Proceedings
of August 8, 1969]

The Emporia City School Board met in the office of the Superintendent of schools on the above date. The following members were present and answered to the roll call:

Mr. E. V. Lankford, Jr., Chairman

Mr. G. B. Ligon

Mr. Julian Mitchell

Dr. Paulus Taylor

Mr. Robert K. McCord, Acting Clerk

Mr. S. A. Owens, School Superintendent

The minutes of the previous meeting were presented to all members, and there being no objections the chairman stated they would stand approved.

Chairman Lankford announced to the City School Board that there was no need to introduce Mr. Owens as the City of Emporia School Superintendent, as Mr. Owens is well known to all members of the board.

A general discussion took place with regard to school operations for the year 1969-70.

After each member of the board had commented, Mr. Owens advised the board of certain requirements, administrative processes, etc.

Mr. Owens was requested to ascertain and determine a policy for the distribution of the costs of administering the joint administration office. Such figures would be used for budget purposes in the current school year.

After a discussion of school assignments with the Superintendent, the following motion was introduced by Mr.

*Minutes of Meeting of School Board of
City of Emporia—August 5, 1969*

Ligon and seconded by Dr. Taylor that, "... the Emporia School Board assigns the present Emporia Elementary School for attendance of all City School Children, of all races, from first through seventh grades and redesignates the Greensville County High School on Harding Street as the Emporia High School and assigns all City School Children, of all races, attending grades eight through twelve to that school." It was further resolved "... that both the Emporia Elementary School and High School be operated in full compliance with the Constitution of the United States and the interpretation of the courts of same, in relation to students and faculty." It was further resolved, "... if the above designated schools are not made available to the City that any and all other buildings used to teach and house the school children of Emporia, be on a completely non-segregated basis." Mr. Ligon's motion was unanimously adopted.

Chairman Lankford advised the board that just prior to today's meeting he had been subpoenaed to appear in Federal Court regarding school matters, August 8, 1969. A motion prevailed that the City Attorney, Mr. Dortch Wariner, together with such assistance as he might require, be authorized to represent the City of Emporia School Board, and its members in any matters requiring court appearances.

There being no further business the meeting adjourned.

ROBERT K. McCORD

Clerk

Proceedings of August 8, 1969

[69]

PROCEEDINGS

(August 8, 1969)

(Friday at 10 o'clock)

The Clerk: 4263, Pecola Annette Wright and others versus County School Board of Greensville County of Virginia and others.

S. W. Tucker and Henry Marsh, III, represent the plaintiffs.

Mr. Fred T. Gray, D. Dortch Warriner and John Kay represent the defendants.

Counsel ready?

[71] . . .

SAM A. OWEN was called as a witness by and on behalf of the plaintiffs, and having been first duly sworn, was examined and testified on his oath as follows:

Direct Examination by Mr. Marsh:

Q. Mr. Owens, would you state your name and address and occupation, sir? A. Sam A. Owen, Superintendent of Schools, Greensville and Emporia.

Q. Mr. Owen, I believe you were subpoenaed to bring certain minutes and information by the plaintiff. Do you have that information? A. Yes, sir, I have those.

Q. Is this a copy of it? A. Right.

Q. Would you give us the names of the present members of the County School Board, sir? A. Mr. Slate, Dr. Adams, Mr. Vincent, Mr. Temple.

[72] Q. What is Mr. Vincent's first name? A. Mr. Billy B. Vincent.

Q. Were these gentlemen members of the Board on June —as of June 1st? A. Right. Yes, sir.

Sam A. Owen—for Plaintiffs—Direct

Q. Now, I believe you have attended several meetings pertaining to the efforts of the city to form a separate school system, is that correct? A. I have attended one meeting with the Emporia City School Board. That was on Tuesday, I think it was.

Q. Which Tuesday, sir? A. This past Tuesday.

Q. That would be August 5? A. August 5 if that is the date.

Q. Who was present at that meeting, sir? A. Present at that meeting were the members of the Emporia City School Board.

Q. Emporia City School Board? A. Emporia City School Board.

Q. Was anyone else present? A. No one else.

Q. No members of the City Council? A. No members of the City Council.

[73] Q. Have you attended any meetings with the members of the Emporia City Council? A. No meetings.

Q. Have you had any discussions with members of the Emporia City Council relating to the forming of a separate school district? A. No discussions with them in reference to this.

Q. Has the—have you attended the meetings of the County School Board, sir? A. I have attended all meetings since I have been there with the County School Board.

Q. Has the County School Board discussed the proposal of the City Council and the City School Board to form a separate school district? A. It was discussed at the one meeting at which time the minutes will show the action taken by the Greensville County School Board, of which you have a copy.

Q. On or about that one meeting do you recall any discussions during the Board meetings? A. No discussions.

Sam A. Owen—for Plaintiffs—Direct

Q. Have you prepared any tentative plans to implement the proposal to form a separate school district? A. No plans have been formulated other than the plans [74] presented here to this Court except in the beginning when we were working over various plans to comply with the New Kent decision. At that time we considered many different plans.

Q. Have you supplied figures to the city officials? A. I have figures open to anybody who would come in and want them.

Q. Have you prepared specific groups of figures in response to a request from city officials? A. The only things—

The Court: Just a moment.

Yes, Mr. Gray?

Mr. Gray: May it please the Court, I am not certain Mr. Marsh knows, and I think the Court is going to get a distorted view unless it knows that Mr. Owen is also the Superintendent of Schools for the City of Emporia.

The Court: I understood his testimony was that he said he was Superintendent of Schools of Greenville and Emporia. I understand that.

Mr. Gray: All right, sir.

Mr. Marsh: Go ahead.

The Court: The question was, were you asked to supply any figures?

The Witness: No figures have been prepared for [75] anyone other than the figures we had in the office that anybody could get. We have prepared no additional.

Sam A. Owen—for Plaintiffs—Direct

The Court: Who asked for them? That is the question. Did anybody from Emporia School Board, or the mayor, or the council, or anybody, did they ask for them?

The Witness: Yes, sir, the Chairman of the City School Board asked for the figures.

The Court: Find out when and what figures he wanted, Mr. Marsh.

Mr. Marsh: Right, sir. That was my next question, sir.

By Mr. Marsh:

Q. When did he request these figures? A. This I am not sure. About two or three weeks ago.

Q. Now, what figures were they? A. They were figures showing the number of students in the county and in the city.

Q. By school? A. I think they were by grades.

Q. By grades and by race? A. By grades and by race as we had to have them for this Court.

Q. Was there a breakdown between pupils who resided [76] in the city and those who resided in the county? A. That's right. We have them broken down that way.

Q. Do you have those figures with the information we requested? A. I don't think those figures were requested there, I believe in the School Board minutes I think we have or they may have been in the School Board minutes.

Q. Mr. Owen, I show you from the information you supplied me what purports to be a copy of the School Board minutes dated July 8, 1969, with figures attached to the minutes of July 16, 1969, with the statement attached and minutes of July 29, 1969. I ask you if you will identify those as being copies of the School Board minutes for those particular dates? A. Right, yes, sir.

Sam A. Owen—for Plaintiffs—Direct

Mr. Marsh: Your Honor, we would like to have those introduced as Plaintiffs' Exhibits.

The Court: So ordered.

Mr. Marsh: That will be one exhibit, I suppose. Plaintiffs' Exhibit 1.

(The documents referred to were received into [77] evidence as Plaintiffs' Exhibit No. 1.)

Mr. Warriner: May I see the exhibit, if Your Honor please?

The Court: Yes, indeed.

Mr. Marsh, don't hand the witness anything until counsel has seen it.

Mr. Marsh: Yes, sir. I am sorry. I just received the document from counsel.

The Court: I understand.

Mr. Warriner: I understand that this is one exhibit?

The Court: That is correct, sir.

By Mr. Marsh:

Q. Mr. Owen, I hand you what purports to be a number of pupils residing in the City of Emporia who attended, or who were expected to attend the public schools in Greenville for the years 1967-68, 68-69, and 69-70. I have shown this to counsel. I would like to ask if you will identify that as the record prepared by you? A. Yes, sir, this record was prepared by me. The figures for 1968-69 are exact figures as of January of this year.

The figures for 69-70 is based on those figures [78] and the census that was made for pre-school students. To the best of my knowledge the figures are correct as to the number of children as of the dates indicated.

Sam A. Owen—for Plaintiffs—Direct

Q. Now, for 1968-69, the current school year, coming school year, those are based on the pre-school census? A. Right. 68-69 is based on actual membership and enrollment as of January of this year taken from teacher reports.

Q. What about 69-70? A. 69-70 are those figures, assuming those in the 12th grade would graduate and based on census figures for the first grade coming in.

Q. When was the census taken? A. The school census was taken just last summer. August or September of last year.

Q. Do you have a pre-school, pre-registration in the spring? A. We have pre-school registration, however, the first graders never are all of those registered. We cannot rely on those figures. We revert to the census figures as to the number of children that should be there.

Q. But you did conduct pre-school registration this past— A. Right.

[79] Q. Do you have those? A. I don't have those figures, but those figures would be less than this for the first grade because so many don't get in to register.

Q. Right. You have subsequent registration in the fall? A. Right.

Mr. Marsh: We would like to have that introduced as Plaintiffs' Exhibit No. 2.

The Court: So ordered.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 2.)

By Mr. Marsh:

Q. Mr. Owen, I have here what purports to be a statement of amount of reimbursement from the City of Emporia to

Sam A. Owen—for Plaintiffs—Direct

the County of Greenville for the operation of schools for several years.

I have shown this to counsel. I ask you ~~if~~ this was prepared by you, sir? A. This figure was prepared by Mr. Cox, our auditor, who was down at your request. So I asked him to complete it for us. These are the figures from which I would have to base my judgment.

[80] Mr. Marsh: We would like to have this introduced as Plaintiffs' Exhibit No. 3.

The Court: So ordered.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 3.)

By Mr. Marsh:

Q. Mr. Owen, I have here what purports to be a statement concerning the expenditures that relate to the schools physically located in the City of Emporia. I would like to ask you if you prepared that statement, sir? A. Yes, sir, I did. It is almost virtually impossible to answer that question since we don't keep records by individual schools but keep them by the entire system.

Q. That is your response to that particular request under subpoena? A. Right. Yes, sir.

Mr. Marsh: We would like to have this introduced as Plaintiffs' Exhibit 4.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 4.)

By Mr. Marsh:

Q. Mr. Owen, I have here what purports to be an excerpt of the minutes from the special meeting of the City **[81]**

Sam A. Owen—for Plaintiffs—Direct

Council and letters of transmittal. I would like for you to identify that. A. This letter was sent to the Chairman of the School Board, yes, sir.

Mr. Marsh: Your Honor, we would like to have that introduced as Plaintiffs' No. 5.

The Court: All right, sir.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 5.)

By Mr. Marsh:

Q. Mr. Owen, I have here a letter of transmittal of what purports to be an option by the County Board and City Council of Emporia and several letters that I would like to ask you to identify those documents, sir. A. These are the documents in our file relative to correspondence with the Town of Emporia and correspondence we received from the County Board, received from the city school.

Q. Other than those documents was there any other correspondence between the County Board and the City Council or the Town Board? A. No correspondence.

Mr. Marsh: We would like to have that introduced as Plaintiffs' Exhibit No. 6, I believe.

[82] The Court: So ordered.

(The documents referred to were received in evidence as Plaintiffs' Exhibit No. 6.)

By Mr. Marsh:

Q. Mr. Owen, when were you employed as superintendent of the Emporia school system? A. Approximately August 15 last year.

Sam A. Owen—for Plaintiffs—Direct

Q. August 15? A. Approximately. I have forgotten the exact date.

Q. 1968? A. '68. This is my first full session there.

The Court: Yes, that's right.

By Mr. Marsh:

Q. This is for ~~the~~ city now, not the county? A. I was employed by the City School Board and County Board.

Q. At the same time? A. Yes, sir.

Q. Now, how many meetings of the City School Board have you attended, sir? A. The City School Board met with the County School Board prior to my coming there. Since being there they met jointly, the two Boards met jointly and they employed another [83] superintendent. One joint meeting and I have met once with the City School Board. I have met monthly with the County School Board with the exceptions of special meetings that were called which would be shown in the minutes.

Q. Now, when was the joint meeting, sir? A. The joint meeting I would have to look back at the date to see. It was prior to July 1st. It was prior to July 1st.

The Court: What did you say the purpose of that meeting was, Mr. Owen?

The Witness: The purpose of that was that the two Boards get together and had the joint responsibility of employing a superintendent was the purpose of that meeting.

The Court: For what year?

The Witness: This was this year.

The Court: Superintendent of what schools?

The Witness: Of Greenville County and Emporia.

Sam A. Owen—for Plaintiffs—Direct

The Court: I thought you had been employed on August 1, 1968.

The Witness: Yes, sir, that was a one-year contract.

The Court: I see. This was for the next year.

The Witness: Yes, sir.

[84] By Mr. Marsh:

Q. That was the first meeting that you had attended, the meeting that was some time prior to July 1st? A. Right.

Q. It was the first meeting of the City Board that you had attended? A. Right. Now, when I first came down, as well as I recall, the two Boards met together for a little while, but it would have been for the same purpose.

Q. Of confirming your contract? A. Right.

Q. And the meeting this year was some time prior to July 1st? A. Right. Some time prior to.

Q. Did you meet with the City Board any time in between? A. I met with the City School Board none in between and only once as a City Board.

Q. When was the one meeting you had with the City School Board? A. That, then, I believe was August 5 we determined that date to be the first Tuesday.

Q. August 5 of this year? **[85]** A. Yes.

Q. I believe you said only the City Board? A. Members of only the City Board were present.

Q. Have you performed any functions for the City School Board since you have been employed by them, sir? A. None—would you repeat that question, please? The whole time that I have been there I have been directly responsible from a superintendent's capacity for the children both in the City of Emporia and in the county.

Q. My question was: have you performed any functions for the City School Board? A. No, sir, other than just

Sam A. Owen—for Plaintiffs—Direct

give them figures that we have in the office for anybody that wants.

Q. Mr. Owen, I have here what purports to be an agreement between the City of Emporia, Virginia, and the Board of Supervisors of Greensville County, Virginia. I would like to ask you if you can identify this document, sir?

Mr. Warriner: If Your Honor please, Mr. Owen had nothing to do with this contract. I will be glad to stipulate that is a copy. I assume it is a copy.

The Court: All right. So ordered. Exhibit 7.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 7.)

[86] The Court: Do you have many more documents, Mr. Marsh?

Mr. Marsh: We are checking, Your Honor.

The Court: Well, the only reason I ask is that it seems to me that counsel are probably going to be in a position to stipulate that they are true copies, if they are really, and we could save some time. We can take a short recess if you have many more and you could get together.

Mr. Marsh: I think that would help.

The Court: All right, we will take a short recess.

(The witness stood aside.)

(A recess was taken at 10:25 to reconvene at 10:50.)

(The witness resumed the stand.)

The Court: All right, Mr. Marsh.

Mr. Marsh: Your Honor, we have reached an agreement as to the exhibits. We have three more exhibits which were furnished by the superintendent.

Sam A. Owen—for Plaintiffs—Direct

The Court: All right, if you pass them up to the clerk they will be marked.

Mr. Marsh: Let me read off what they are.

The Court: Exhibit 8 or 9?

[87] Mr. Marsh: Eight will be the School Board budget for the three years 67-68, 68-69, 69-70.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 8.)

Mr. Marsh: Nine will be the average daily attendance figures for 1960 and for 1967-68, 68-69, and 69-70.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 9.)

Mr. Marsh: Ten will be the suit papers of a suit that was filed in the Circuit Court of the County of Greenville against the County School Board and City School Board and the County Board of Supervisors and the County School Board.

Mr. Warriner: If Your Honor please, I believe that one has to do with the budget and does not include 69-70.

The Court: It will speak for itself, but it is the School Board budget.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 10.)

Mr. Marsh: Your Honor, we have no more questions of Mr. Owen.

The Court: Very well.

Any cross-examination, gentlemen?

*Sam A. Owen—for Plaintiffs—Cross***[88]** *Cross Examination by Mr. Warriner:.*

Q. Mr. Owen, could the superintendent's office readily draw a plan complying with the requirements of the Constitution and the orders of this Court excepting the city school children and the former elementary children in the elementary school? A. We have all the figures showing the number of students in each grade. We have other figures showing the number of rooms in each of the buildings that we are now using. It would be a matter of arithmetic to sit down and figure buildings that would be used. A plan could be worked out, yes, sir.

The Court: You mean like when you say a matter of arithmetic, you mean a matter of a couple hours' or days' work?

The Witness: A day's work as far as figuring from the arithmetic part of it.

The Court: Well, the question was, could you readily draw a plan. Now, let's have a yes or no answer.

The Witness: Yes, sir, I can draw a plan physically putting children in to be presented to the Board for their approval.

[89] The Court: Now, I would like to know how long it would take you to draw that plan. When you say readily, that could mean anywhere from a day to five months.

The Witness: I could sit down and draw a plan, but then that plan we drew out to be presented to the Boards would depend upon the Boards' approval.

The Court: Never mind the Board. The question was could you readily draw a plan that would be

Sam A. Owen—for Plaintiffs—Cross

consistent with the requirements of law. That is what counsel meant.

The Witness: Yes, sir.

By Mr. Warriner:

Q. Would that be a day's work or two days' work, or a morning's work? A. As far as placing numbers in classrooms, a day's work.

Q. And then the rest of it is what you have to do with regard to the Board, is that correct? A. Yes, sir.

Q. Would these figures—would this plan render available to the city school system Emporia Elementary School and Greenville High School?

The Court: I am afraid I didn't understand that question, Mr. Warriner.

[90] *By Mr. Warriner:*

Q. Could such a plan render available to the city school system the Emporia Elementary School building and the Greenville County High School building? A. If the city children were not going with the county children and a new plan were presented, buildings would be empty.

Q. Would there also be a surplus of teachers in the county school system? A. Naturally if you lose 12 or 1300 students it would be more teachers than the Greenville County school system would need for these children.

Q. Is your contractual relationship with your faculty such that they could be released and hired by the city school system if the bodies so agreed? A. If the—

The Court: That is true of any contract, isn't it, Mr. Warriner? If everybody agreed you could abrogate it.

Sam A. Owen—for Plaintiffs—Cross

By Mr. Warriner:

Q. Speaking of the two bodies and not the teachers agreeing, but the two governmental bodies agreeing. Of course, the teachers would have to agree also? A. On agreement between teachers and the School Board [91] the contract can be broken in 15 days. The teachers can be released. Fifteen days notice with agreement between the two parties.

Q. The figures that you furnished to Mr. Langford, the Chairman of the Emporia City School Board, were these figures the same figures that you had submitted to the Court in this case in compliance with the Court's request?

A. I did not submit those figures in the exact form, however, in our office as of January we worked up the figures in every conceivable manner in which they might be asked so we could go to the one source and use these. They are figures we have copies laying in there, as I mentioned before, we would furnish anybody at their request.

Q. In the Exhibit B, I believe it was, Exhibit 2, this is a sheet of paper, as I recall it, in which you project the attendance to the county schools for the year 1969-1970. In that exhibit are you assuming that all children who attended county schools last year will attend county schools this coming year without any withdrawals or other acts being taken by the parents? A. That's right. With no action taken by parents and no withdrawals, then that is the number of students we would expect approximately. A small percentage one way or the [92] other.

Q. Mr. Owen, do you consider as an educator the plan advanced by the city a feasible plan for the education of the city children in the year 1969-1970? A. The plan as presented to the Court now, I only know what I read in the paper about that, and reading in the paper I read right

Sam A. Owen—for Plaintiffs—Cross

many wrong things in the paper lately. I would like to see the plan and study it over before answering that.

Q. If the city's plan included the education of city school children in the Emporia Elementary School for grades one through seven and in Greenville County High School buildings for grades eight through twelve in the year 1969-1970, assuming some 1,350 to 1,400 students, assuming teachers are available and assuming that the equipment presently in the school is available, would that be a feasible educational plan for the education of the children for the City of Emporia? A. It would be, I think.

Q. Could such a plan be implemented for the school year 1969-1970, in your opinion, as an educator? A. If the School Board's buildings are provided by the—

Q. Leaving out the policy question, sir. I want to [93] know the physical facts. A. Yes, sir, if we have got the teachers and the buildings we can educate the children.

Q. All right, sir.

It appears that some suggestion is being made of collusiveness by someone. I ask you, Mr. Owen, whether I have conferred with you about this case other than over a cup of coffee, and about a half a cup?

The Court: I don't want him to answer that. You are an officer of this Court, Mr. Warriner. You need not protect yourself, sir.

Mr. Warriner: Thank you, sir.

No further questions.

The Court: Mr. Gray?

May I find out who is representing who here?

Mr. Gray: If Your Honor please, I am still representing the County School Board of Greenville

Sam. A. Owen—for Plaintiffs—Cross

County. Mr. Warfiner and Mr. Kay are representing the School Board for the City of Emporia.

The Court: All right, sir.

Cross Examination by Mr. Gray:

Q. Mr. Owen, there has been introduced into evidence [94] as Exhibit 1 the minutes of several Board meetings commencing with July 8. One of those was the meeting of July 16, 1969, to which is attached a statement of the Board minutes that say that the Board reconsidered plans approved July 8 and instructed Adolphus G. Slate, Chairman of the School Board, to release the following information. And there follows a statement with respect to the position of the County School Board and the matter that is now before the Court with respect to the withdrawal of the students.

I ask you, sir, was that the position that the County School Board took at that time with respect to this matter?

A. Yes, sir, that is the position the County School Board took.

Q. Well, has there been any change in the position of the County School Board to your knowledge? A. No, sir, to my knowledge there has been no change.

Q. Mr. Owen, with respect to the question on the drawing of the plan. I ask you if in conjunction with the efforts of the County School Board to come up with a plan for this Court have you compiled statistics as to where all the children live, and do you have maps showing the location of the children, spot maps I believe you call them? A. Yes, sir. We have spot maps.

[95] Q. You have broken these down into various zones? A. Yes, sir.

Sam A. Owen—for Plaintiffs—Cross

Q. And you have "broken" them down as between the county and the city? A. Yes, sir.

Q. Had you not done all of that groundwork would you be able to say to the Court you could draw a plan in a day?

A. No, sir.

The Court: You knew how many lived in the city all the time, didn't you, Mr. Owen? If you are going to use two schools in the city what would be so difficult? You knew how many children lived in the city, didn't you?

The Witness: Yes, sir.

The Court: You didn't need a spot map for that, did you?

The Witness: I had to go back through the figures to find out where the children lived. When the Courts come in to us in one direction without going back and getting the additional information. So I couldn't tell.

The Court: What you are saying is that you could readily draw a plan by virtue of the work you had already done as Superintendent of the Schools for all of the children?

The Witness: Yes, sir. And compiling that [96] information that I would need.

The Court: And under the plan that you could draw, or as contemplated or suggested by counsel, the City School Board would be doing what the County Board had been doing, is that correct? They would be acting in their place in reference to the city children?

The Witness: They would be acting with regard to the city children.

Sam A. Owen—for Plaintiffs—Cross

The Court: They would be the successors to the School Board of the County insofar as those children are concerned, is that correct? They would be doing the same thing?

The Witness: The county under the proposed plan, as I understand it, the County School Board to be responsible for the education of children in the county and the city would be responsible—

The Court: Right. And before it the county was responsible for the city and county children?

The Witness: Yes, sir. By agreement.

The Court: Insofar as the city children are concerned, the new Board, that is the Board that is going to begin to act now, because they haven't acted before—

The Witness: In selection of superintendent.

The Court: That is all. But then they would be [97] doing what the County Board has been doing?

The Witness: For the Chairman in Emporia.

The Court: If that is not a successor I don't know what is.

Go ahead.

By Mr. Gray:

Q. With respect to the—maybe I misunderstood the question that was asked previously, but my understanding was that if you respond you could draw a plan for the county children because of the information that you now have also, is that correct? A. Yes, sir, I have the figures now that we would need, yes, sir.

Q. And I believe we told the Court when the last plan was approved by the Court that in the event the city children should be withdrawn that we would ask the Court

Sam A. Owen—for Plaintiffs—Redirect—Recross

to indulge us in the preparation of a different plan because we would be dealing with about half the number of children? A. Yes, sir. At least we requested that.

Mr. Gray: All right.

Redirect Examination by Mr. Marsh:

Q. Mr. Owen, you say you have the breakdown between [98] the city and the county. What is the general racial breakdown between the children in the county and again the children in the city? A. This is approximate. I don't have the figures in front of me. In the over-all it is approximately 63 per cent Negro over-all. Approximately 50 per cent Negro in the city.

Q. And what is the approximate percentage in the county? A. It would be greater than 63 per cent. On up to 69, 68, or 70. Somewhere along in there.

Q. And what is the approximate number of children we are talking about in the city, and approximately the number in the county? A. Approximately 1,300 in the city and approximately 2,900 in the county.

Mr. Marsh: No further questions.

The Court: Any further examination, gentlemen?

Recross Examination by Mr. Warriner:

Q. Mr. Owen, the City School Board for the City of Emporia pre-existed the attempt to form this school, city school; is that correct? When was the City School Board, City [99] of Emporia, instituted? A. It was there prior to my coming.

Q. You are familiar, of course, with the operation of the state schools and state school rules and regulations.

George F. Lee—for Plaintiffs—Direct

Is the City of Emporia required by law to have a City School Board? A. Yes, sir, they must have a City School Board.

Q. Is this City School Board required by law and by the Constitution of Virginia to see to the education of children of the City of Emporia? A. They are charged with that responsibility, yes, sir.

Q. Do they receive that responsibility as successors to the County School Board or in their own right under the statute and under the Constitution? A. My understanding is under the statute and the Constitution the School Board in a locality is responsible for the education of the children in this jurisdiction.

Q. Thank you.

Nothing further.

The Court: Anything else, gentlemen?

Mr. Marsh: No questions.

The Court: You may step down.

[100] Thank you, Mr. Owen.

(The witness stood aside.)

The Court: Call your next witness.

Mr. Marsh: Mr. Lee.

GEORGE F. LEE was called as a witness by and on behalf of the plaintiffs, and having been first duly sworn, was examined and testified on his oath as follows:

Direct Examination by Mr. Marsh:

Q. Would you state your name and address, and occupation, please, sir? A. My name is George F. Lee. I am

George F. Lee—for Plaintiffs—Direct

Mayor of Emporia. I run a retail jewelry store. I live at Emporia, Virginia.

Mr. Marsh: Your Honor, we have shown the exhibits which we hope to put in by Mr. Lee to counsel and by agreement they can be admitted. We would like to present them all at the same time.

The Court: All right, sir. Fine.

Mr. Warriner: Mr. Marsh, are those exhibits you are introducing now all of the exhibits you subpoenaed or a selection from the exhibits you subpoenaed?

Mr. Marsh: They are selections, I believe.

The Court: Put them all in.

[101] Mr. Warriner: I understand they should all go in.

The Court: They are all in. Put them in.

Mr. Marsh: We only left out one.

The Court: Put it in anyway.

The Clerk: These are considered one exhibit?

Mr. Marsh: No. We would like to have them marked separately.

The Court: As separate exhibits?

Mr. Marsh: Yes, sir.

The Court: All right. You prepare the list, then.

Mr. Marsh: All right, sir.

First will be a copy of the minutes of the City Council of Emporia.

Mr. Gray: Is that No. 11?

The Court: That will be 11. Start with 11 and you mark them in pencil, Mr. Marsh. Then you prepare a list for the clerk.

George F. Lee—for Plaintiffs—Direct

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 11.)

Mr. Marsh: Your Honor, there are three or four minutes that are pertinent to this issue. We have prepared [102] those as a separate exhibit for convenience.

The Court: Very well.

Mr. Marsh: That includes the meeting of July 9, July 14, July 23rd.

The Court: Now, are these exhibits being marked 11?

Mr. Marsh: Those will be 12.

The Court: 12. All right.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 12.)

Mr. Marsh: And July 29. These will be No. 29.

The Clerk: Merely additional minutes?

Mr. Marsh: No, sir. All of the additional minutes will be 11, the earlier minutes. The later minutes beginning with July 9 will be No. 12.

The budget of the Town of Emporia for 1967-68 will be Exhibit No. 13.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 13.)

Mr. Marsh: The budget for the City of Emporia for 1968-69 will be No. 14.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 14.)

[103] Mr. Marsh: The budget for the City of Emporia for 1969-1970 will be No. 15.

George F. Lee—for Plaintiffs—Direct

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 15.)

~~Mr. Marsh:~~ The payments to the county by the Town of Emporia for the operation of schools for the city children will be No. 16.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 16.)

The Court: You refer to the Town of Emporia and the City of Emporia. Somebody better explain it to me before we are through.

Mr. Marsh: I think the Mayor can explain that. The payments for 1968 appear to be payments for 1968-69 and will be No. 17.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 17.)

Mr. Marsh: Payments for 1967-68 will be No. 18.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 18.)

Mr. Marsh: Statement of the expenditures of the City of Emporia will be No. 19.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 19.)

The Court: No, that is 20.

Mr. Marsh: The last one I had was 18.

The Court: What was the last one? 18?

Mr. Marsh: The last I had was 18.

The Court: All right.

Mr. Marsh: The statement showing the expenditures should be No. 20.

George F. Lee—for Plaintiffs—Direct

The Court: Have you seen these before? Do you know whether you want them or not? It appears to me you haven't seen them.

Mr. Marsh: They insisted they all go in.

The Court: Then put them in and make up the list. I want to finish before tomorrow.

Mr. Marsh: 21 will be the letter dated July 29 from the City School Board.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 20.)

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 21.)

Mr. Marsh: Your Honor, there is a telegram, Your Honor, sent by Mr. Lee, purportedly. I would like to have that introduced as 22. It is in the Court's file, sir.

[105] (The document referred to was received in evidence as Plaintiffs' Exhibit No. 22.)

Mr. Marsh: I don't believe counsel has seen it. May I show this to counsel?

The Court: With the note attached placed there by the Court. While they are looking at it, Mr. Lee, I hope you understood the Court's position as to why I could not read it until counsel had acquiesced.

The Witness: Yes, sir.

The Court: Is that the way you wrote it, Mr. Warriner?

Mr. Warriner: If Your Honor please, I am not certain.

Mr. Marsh: Mr. Lee, I would like to show you what purports to be a telegram. Would you see if you can identify it, sir?

George F. Lee—for Plaintiffs—Direct

The Witness: Yes, sir, I understand there was some misspelling in it.

Mr. Marsh: Other than the misspelling this is it?

The Witness: Yes, sir, this is the telegram.

The Court: Careful now, Mr. Lee. You look at it real close.

The Witness: I will have to read it, Your Honor, [106] if you please.

The Court: I will tell you what you are going to get to is that part where you intend to operate schools with regard to race.

The Witness: That is what I meant. This, of course, was completely erroneous and was not our intent, naturally.

The Court: Sorry, Mr. Marsh. You have got to get them on the wing.

The Witness: Thank you, sir.

Direct Examination by Mr. Marsh:

Q. Now, Mr. Lee, I believe you were present at the meeting of the City Council at which this matter was discussed?

A. Yes, sir.

Q. And I believe this idea of forming a separate school district, according to the minutes, was formed after the Court's order of June 25? This meeting was in July? A. On this specific plan, yes, sir.

Q. Do you know which schools the county planned to, or the city planned to use to operate their plant? A. Yes, sir.

Q. Which schools? [107] A. We would propose to use what is presently now the Greenville Elementary School located on Main Street for all of the children between one and seven. We would propose to use the high school as located on Harding Street for all of the children between the ages or the grades of eight through twelve.

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George F. Lee—for Plaintiffs—Direct

Q. What other buildings, sir? A. That is all, sir.

Q. Now, I believe those two particular buildings are buildings that were formerly the all-white high school and the all-white elementary schools, is that correct? A. That is correct, sir.

Q. And presently they are being used to house predominantly white populations, is that correct? A. That is correct. That is correct, sir.

Q. Only Negroes who have elected to choose out by freedom of choice are enrolled there? A. Yes, sir.

Q. May I have the exhibits?

Mr. Lee, I believe you were Mayor when the Town of Emporia became the City of Emporia? A. Yes, sir.

Q. Would you explain to the Court how that came about, [108] sir, and when? A. Sir?

Q. And when? A. All right, sir. Actually the Court decreed that we would become a city on July 31, 1967, a city of the second class. Our reason—did you ask me the reason for it? How it came about?

Q. I said how it came about. A. We just went through the regular court proceedings of having an enumeration and the statute I believe states that if you have 5,000 in population or more you may become a city of the second class. We elected to become a city of the second class. It was made effective after we had proven to the Court that we did have in excess of 5,000 population on July 31, 1967.

Q. I believe you are familiar with the agreement between the county and the city? A. Yes, sir.

Q. Are you familiar with paragraph 8 dealing with the methods for terminating the agreement? A. Generally. I would have to read it. I was in on the negotiating, but, of course, I believe the method would be for annexation proceedings or something of that nature.

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Isn't that correct, sir?

[109] Q. Would you check the agreements, sir? A. All right, sir.

Q. Would you indicate the notice that has to be given by your party in order to terminate the agreement? A. All right, sir.

It is a four-year agreement.

Q. And when was it entered into, sir? A. It was, I believe, in April of 1968. I believe April, 1968, the parties agree—you don't want me to read this?

Mr. Warriner: This is in evidence and it speaks for itself.

The Court: It speaks for itself.

Mr. Marsh: I was asking the witness if he knew the provisions for terminating?

The Witness: Yes, sir. I know them.

Mr. Marsh: What kind of notice?

The Court: Why don't you lead him? Say, "Isn't it true that the agreement requires so much notice?" See if that doesn't help, Mr. Marsh.

By Mr. Marsh:

Q. Is it true that you have to give more than a year's notice to terminate the provisions of the agreement, Mr. Lee? [110] A. That is one of the provisions. There is another provision. The parties also agree that if annexation proceedings should start then that would immediately terminate the agreement.

Q. It would terminate by the commencement of the proceedings? A. Yes, sir.

Mr. Warriner: If Your Honor please—

George F. Lee—for Plaintiffs—Cross

The Court: I will read it, Mr. Marsh, really.
Mr. Marsh: Very well.

By Mr. Marsh:

Q. Mr. Lee, prior to the meeting in July there had been no discussion about the City Council with respect to operating a separate school district. It doesn't appear in the minutes. A. There has been many, many discussions, sir, on it.

Q. But not in the meeting? A. No, sir.

Mr. Marsh: I have no further questions of this witness, Your Honor.

The Court: Any cross-examination?

Mr. Warriner: If Your Honor please, I may have [111] been a bit hasty when Mr. Owen was a witness. I was cross-examining Mr. Owen reserving the right to recall him as a witness.

The Court: Oh, of course. Of course.

Cross-Examination by Mr. Warriner:

Q. I would reserve the right with all our witnesses.

Mr. Lee, the school district for the City of Emporia was formed, as I understand it, on the 1st of August, 1967. Is that correct? A. That is correct. Yes, sir.

Q. And has been existing since the 1st of August, 1967?

A. Yes, sir.

Q. The School Board for the City of Emporia was appointed in August of 1967? A. Yes, sir, that is correct.

Q. And has been in existence since August of 1967? A. Yes, sir.

Q. The City of Emporia discharged its obligation to educate its children by means of payments of some sums of

George F. Lee—for Plaintiffs—Cross

money to the County of Greenville in return for which the County of Greenville agreed to educate the children without tuition [112] charge to their parents, is that correct?

A. That was part of the agreement we made, yes, sir.

Q. Was this agreement entered into immediately in August of 1967? A. No, sir.

Q. Were there any problems in connection with getting such an agreement and did those problems include the probability of the City of Emporia at that time operating its own school system? A. Yes, sir.

Q. Go ahead, sir. A. We met many, many times after we became a city of the second class attempting to establish equities in the school buildings in order to operate. We were turned down flat by the county in every instance. Finally they even threatened to not let our children go to the schools, and this is why we were forced into an agreement a year later almost.

Q. This was in the middle of the school year 1967-1968 they threatened to make your children withdraw from school? A. Yes, sir, if we didn't pay for them.

Q. It was at that time and under those circumstances that you entered into the contract of April 1st or April 4, 1967, or 1968? [113] A. 1968, yes, sir.

Q. Did you at that time contemplate that the contract might be terminated under its terms and the city form its own school system? A. From the day that the contract was made we attempted—we contemplated breaking it, yes, sir.

Q. I asked you whether you contemplated terminating it by its own terms.

The Court: It sounds like a fair arrangement.

George F. Lee—for Plaintiffs—Cross

By Mr. Warriner:

Q. Mr. Lee, the school buildings which you have stated is according to the School Board's plan would be the schools operated by the city. Are those buildings also located within the City of Emporia? A. Yes, sir.

Q. Is there another school building located within the City of Emporia? A. Yes, sir.

Q. Is that building needed in order to educate the children of the City of Emporia? A. No, sir.

Q. Is that building as well equipped and as modern a building as the Main Street one which you are choosing? [114] A. No, sir.

Q. Should the City of Emporia take on the obligation of operating and maintaining along with the upkeep of that building when it doesn't need it? A. No, sir, the building is in bad shape.

Mr. Marsh: Your Honor, I have tried to bear with the leading but I think it is getting a little far out now. I would suggest that counsel not lead the witness quite so far.

The Court: You object?

Mr. Marsh: Yes, sir.

The Court: Overruled.

Go ahead. Let's get moving.

By Mr. Warriner:

Q. Now, Mr. Lee, did you or the City of Emporia, I should say, have any control here to say who was sent to which school and for what reasons? A. None whatsoever.

Q. Was it a part of the policy of the City of Emporia to maintain segregated schools, de facto segregated schools,

George F. Lee—for Plaintiffs—Cross

pseudo segregated schools, or any other type of segregated schools? A. No, sir.

Q. Has the City of Emporia at any time ever had an [115] opportunity to officially present its position as to what type of schools should be operated within the City of Emporia? A. Never had the opportunity.

Q. Is it the purpose of the City of Emporia in operating its schools beginning in 1969-70 to have a unitary school system both with respect to the pupils and with respect to the faculty and administration, and is it the purpose of the School Board of the City of Emporia to have such a system in compliance with the Constitution of the United States and all decisions applicable to the operation of the public schools? A. Absolutely.

Q. Will the School Board and the City of Emporia directly or indirectly deprive any citizen of Emporia of his rights under the Constitution of the United States and the court decisions interpreting same? A. Of course not, no, sir.

Q. A question was raised, Mr. Lee, on direct examination, as to whether the implication was as to whether the actions taken by the city was a direct result of the decree entered by this Court on the 25th of June, 1969. Would you explain to the Court what precipitated the action on the part of the city including reference to that decree? A. Well, there is no question that this decree caused [116] the city to try and act with haste. I am absolutely opposed to private school systems, and a movement started immediately. I fought it. I am opposed to it. I feel we have an obligation to the citizens and the children in Emporia on a complete non-racial basis. We can operate. The way it is now a child starting in the first grade in the City of Emporia will have to be bussed to six different schools before he leaves high

George F. Lee—for Plaintiffs—Cross

school. I feel that all of our children, and it is a money thing too—we are paying more than our share. We have one-third of the pupils in the county live in the City of Emporia, but we are paying 38 per cent of the county debt services and we are paying 34.26 per cent of the total cost of the schools. Included in that is bussing in which a majority of the children of Emporia don't receive this transportation business.

So I feel that if we could be allowed by the courts to operate a complete non-segregated school system and lump all of our children from this group into one school age group into this group and this age group for high school in the other school we can save on transportation, save the taxpayer's money, and we can have a better system by having more curriculum than is presently furnished our children, which we have no control over. And I think our people deserve a better school program, black and white. This is why we decided this was the [117] time to go and kill this private school business before it got started, and serve all the citizens of the City of Emporia.

Q. Mr. Lee, did the City of Emporia have the leadership and the will to make the transition from a largely segregated school system to a completely unitary school system?

A. Absolutely. We have our city and our town has a non-racial hiring practice. If I might elaborate for a moment, Your Honor.

Q. If you will. I want you to answer this question that has to do with the will to go to a unitary school system and then if you want to elaborate. A. Absolutely and without question. And our citizens are 100 per cent, I say, behind us on it.

Q. Does the city have any question about the county's ability to operate a unitary school system? A. I do, yes, sir. I don't know about the city. I say that I do.

George F. Lee—for Plaintiffs—Cross.

Q. You are Mayor and preside at the Council meetings?

A. Yes, sir.

Q. Do you have any impressions from that? A. We have never been able to get cooperation from the County Board of Supervisors, and that is who our contract is with. And that is who we are paying the money to. We are [118] not paying it to the School Board. And so it is a question in my mind, yes, sir. I think it is a question in the minds of the members of the City Council.

Q. Is it the opinion of the City of Emporia that in order to have a well-functioning, working unitary system in the heart of southside Virginia that it will take the leadership of the city government and of the leading city members and the members of Council and so forth in order to provide the children with the best possible education? A. Yes, sir. Our educational system needs to be improved, and I think under this system we can improve it.

Q. Mr. Mayor, what reasons prompted the city—I shouldn't say reasons—what were the factors which the city took into account in making its determination to become a city of the second class in August of 1967? A. The inequities involved, again, prior to this agreement. This agreement that we reached.

Q. No, sir. A. Okay, excuse me.

Q. What factors prompted the city to become a city of the second class in August of '67? A. Well, the sales tax is one thing. The other was the inequities we were sharing with the county at that time. [119] We were paying about 49 per cent of the operating cost of the county at that time.

Q. By what— A. 39, I am sorry.

Q. Speaking of the citizens of the Town of Emporia? A. With one-third of the population we had no say-so in assessments or reassessments in appointing these groups

George F. Lee—for Plaintiffs—Cross

and we were haggled. We tried to set this straight. This contract helped some, but it still didn't equalize the inequities. But when the state passed the sales tax and did not put it back to the point of collection and let the county overrule the towns on it then we became a city of the second class.

Q. Would it be correct to say in summary there were economic reasons? A. Very definitely.

Q. Mr. Mayor, in your opinion can the City of Emporia commencing in the school year 1969-1970 provide for all of the children of the City of Emporia a unitary school system which complies with the statutes and the laws and with the Constitution, which will give them a substantially superior education to what you can reasonably contemplate would be received from the county school system? A. Without question, yes, sir.

[120] Q. Is that your primary motive in seeking the separate school district operation of schools? A. Absolutely. Without question.

Mr. Warriner: Would Your Honor excuse me for one minute?

By Mr. Warriner:

Q. Mr. Mayor, what has been the history of the race relations in the City of Emporia over the past—how many years have you been connected with the city government? A. About 12.

Q. Over the past 12 years? A. Our race relations have been excellent. We have appointed long ago a bi-racial committee. When we became a city we were then under the Constitution, as I was advised by our attorneys, were supposed to appoint a Justice of the Peace from each ward,

George F. Lee—for Plaintiffs—Cross

first established wards. We have a distinguished citizen of our city, Dr. Paul Taylor, a Negro, who was one of the first appointees to the City School Board. We appointed a distinguished citizen as Justice of the Peace in that particular ward.

We only had at that time a seven-man police force and we have hired two Negroes. We only have one working now. We applied for a dispatcher and we didn't apply for race, creed, [121] or color. We just hired recently a Negro lady who is a dispatcher for the city police.

We have never had a demonstration. Our city instituted the action that built a \$25,000 Olympic pool in the Negro district. I ran Norman Lincoln Rockwell out of town because he came in to stir things up. The Court later freed him, but I didn't let him speak in Emporia, and I found out later by the Courts that I was illegal in getting him out. But we have a non-racial hiring practice and I think our industry in the area are the same way.

We have got a new industry in town that has got a Negro foreman working predominantly white people. This has never been a concern of mine or the citizens in the city.

Q. When did you institute your non-racial hiring practice for police, police dispatchers and the like? A. Well, this has been going on for several years. I couldn't tell you exactly.

Q. Do you believe—I don't suppose you could speak as an expert— A. No, sir.

Q. —but do you have reason to believe that your action in instituting a separate school system for the city has the support of both the black community and the white community [122] in the City of Emporia? A. I think we have a majority of the support of all the citizens in Emporia.

Q. Do you believe that both communities have the con-

George F. Lee—for Plaintiffs—Redirect

fidence in your ability and your willingness to have a completely unitary school system that will be operated without regard to race? A. I think all of the citizens in Emporia trust me, if I said that is the way it would be.

Q. Do you also have the confidence in the School Board for the City of Emporia that they will carry out the directions of the City Council? A. Yes, sir, absolutely.

Q. Are you aware of the racial composition of the city schools? A. Yes, sir.

Q. Do you know what the percentage would be, or ratio? A. I could only say roughly 50-50. It would be larger in the elementary schools and less in the high school, but just a few percentage points. I don't know what they are. The judge has them, I am sure, sir.

Mr. Warriner: Thank you, Mr. Lee.

[123] Mr. Gray: No questions.

The Court: Redirect?

Redirect Examination by Mr. Marsh:

Q. Mr. Lee, you are aware of the litigation that has been pending since 1965 to desegregate the schools? A. Yes, sir.

Q. It is the fact that your Council and almost everyone in town is aware of that litigation, wouldn't you say? A. Yes, sir, I would. Yes, sir.

Q. Now, did your Council ever publicly declare its concern that the school systems be completely integrated? A. No, sir. We have never had the opportunity to confront or meet with the Board of Supervisors that just built a bridge across town.

Q. Did you ever state publicly a resolution or make a speech? A. When we became a city?

George F. Lee—for Plaintiffs—Redirect

Q. Saying that you wanted to completely integrate the school system? A. I could not say. I would have to answer "no" to that question. Yes, sir.

Q. Now, the only high school left in the county, if [124] the Greenville school would be used by the city, the only high school left would be the Wyatt High School, is that correct? A. Yes, sir, which is identical to the other school.

Q. Has any white children ever attended the Wyatt School, sir? A. Except in a summer program I don't believe so.

The Court: Isn't that the building that you said was in such bad shape?

The Witness: No, sir. No, sir.

By Mr. Marsh:

Q. That is known as a Negro high school though, isn't it? A. Basically, yes, sir. Yes, sir. That is correct.

The Court: Let me get it straight now. I thought you said one was in deplorable condition.

The Witness: Your Honor, if you please, there is inside the city in the last few years the county has built all the new schools outside of the city. But there is in the City of Emporia an elementary school that was used as a Negro school that is in bad shape. This Wyatt High School, because all of the new buildings have been built surrounding the county, and all districts have a new school, the Wyatt High School he is speaking of was built the same way as the identical plan to the [125] white high school insofar as a plant building is concerned, and is in excellent condition.

The Court: What you are saying is there would only be one high school left in the city available for

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use by the county, but there will be elementary schools?

The Witness: No, sir, there would be a high school in the city and a high school in the county that are identical.

The Court: I want to know what is left after you used what you want to use available to the county in the city.

The Witness: There is this old physical plant that needs a lot of renovation.

The Court: That was an elementary school?

The Witness: It just had some renovation done and the Superintendent of Schools—

The Court: There would be two physical plants in the city that would still be available to the county, is that correct?

The Witness: No, sir, only one.

The Court: Only one?

The Witness: Yes, sir. I am sorry.

The Court: What is the name of it?

The Witness: That would be the Greenville County [126] Training School I believe is the name of it, isn't that correct? Yes, sir.

By Mr. Marsh:

Q. That is an elementary school? A. Yes, sir.

Q. So the only high school left in the entire county would be the Negro high school, the Wyatt High School? A. Yes, sir. It is a present high school. That is what it is used as now.

Q. Now, did the School Board or Council ever attempt to intervene in the litigation that was pending? A. No, sir. We have never been asked to a meeting, sir.

George F. Lee—for Plaintiffs—Redirect

Q. I am sorry. I didn't understand. A. No, sir, we have never been asked to a meeting, I don't believe.

Q. I wasn't speaking of a meeting. I said, did you ever attempt to intervene in the litigation? A. Oh, no, sir. No, sir.

Q. In this court? A. No, sir.

The Court: You weren't looking for trouble, were you?

[127] The Witness: No, sir.

By Mr. Marsh:

Q. So really you didn't avail yourself of the opportunity to present your views to this Court? A. No, sir.

Q. You indicated that you could comply with all the decisions of the Court. You said you were aware of the order entered by this Court providing for the desegregation of the schools? A. Yes, sir.

Q. Under your plan you would not be able to comply with that order? A. Not the order of this Court as presented for the county plan, but we would send all of our children, black and white, to the one elementary school, and all children, black and white, to the high school. That plan has never been presented to this Court, I don't believe.

Q. I am speaking of an order that was entered by this Court which prompted you to act. Under your plan you would not be able to comply with that order as it is written? A. Oh, no, sir. No, sir.

Q. I believe you were aware of that when you started your plan, that you wouldn't be able to comply with that order? [128] A. Yes, sir.

Mr. Marsh: No further questions.

George F. Lee—for Plaintiffs—Recross

Recross Examination by Mr. Warriner:

Q. Mr. Lee, in order to try to straighten out the question about the school business, is it not correct that there are three elementary school buildings located in the county?

A. There are more, aren't there? Yes, three new ones, yes, sir.

Q. Are all of those three elementary school buildings newer than any school building located within the city? A. Absolutely.

Q. Have they all been built within the past five or six years? A. Yes, sir.

Q. One of them in fact was just completed last year? A. Yes, sir.

Q. Is there one, the county high school building which is newer than any school building within the city? A. It is the same age.

Q. Same age? A. Yes. I mean both were built at the same time [129] brick by brick, plan by plan. Identical plan in both of them.

Q. Is the city then attempting to take the best from the county in the way of physical facilities, or is it instead taking only that which is within the city? A. That is all. That is correct, yes, sir.

Q. Now, there remains one other school, the Greenville County Training School, which is within the city. A. Yes, sir.

Q. Is that building, regardless of its condition, is that building needed by the city? A. No, it is not needed and it has a new addition to it that was just built onto it, but it is not needed by the city, no, sir.

Q. Is it as big as the Emporia Elementary School? A. No, sir.

George F. Lee—for Plaintiffs—Recross

Q. Could you use that instead of the Emporia Elementary School? A. No. No, sir; it would not be large enough to handle the children.

Q. Would there be any need to divide the children between Greensville County Training and Emporia Elementary School? A. I wouldn't want to divide the children in race. [130] I would want to put them all together.

Q. Even if they weren't divided by race? A. If we didn't have them together to give them the very best education we can.

Q. Now, Mr. Lee, you are aware, I believe you answered on direct examination, you are aware of the purposes of the Court's order of the 25th of June, 1969, are you not? A. Yes, sir.

Q. And I believe that the purpose of that order as stated in the order is to have a unitary non-racial, non-racially identifiable, neither black nor white, just schools? A. Yes, sir.

Q. Has the City of Emporia done anything of any nature to frustrate the effect of that order? A. No, sir.

Q. Has it been the intent, the purpose—well, I suppose intent and purpose are not proper for inquiry, but do you know of any desire on the part of the City of Emporia to frustrate the order of the Court? A. We asked at a meeting, and asked by letter, for the county to inform the judge of it prior to his entering this order, of what we wanted to do and the reasons why.

Q. After he entered the order? [131] A. It was after he entered the order, right. That came back from an appeal, right.

Q. Did you ask the county to request the Court to so draw a plan that you could take or you could be accommodating to his order? A. Yes, sir.

George F. Lee—for Plaintiffs—Recross

Q. In having a unitary system in the City of Emporia?

A. Yes, sir.

Q. Do you know whether the county did that? A. As far as I know they did not.

Q. Did you then attempt to advise the Court yourself by telegram? A. I did, sir.

Q. So that the Court would know that the purpose of the actions of the City of Emporia were to accommodate too and carry out his order rather than to frustrate it? A. Yes, sir.

Mr. Warriner: Thank you, sir.

Mr. Tucker: If Your Honor please, I know Mr. Marsh has examined the witness before, but there are two or three things that my familiarity with Greensville County would assist in if I could be permitted to examine.

The Court: Only if there is no objection.

[132] Gentlemen, any objection?

Mr. Warriner: No, sir.

Further Examination by Mr. Tucker:

Q. Mr. Lee, the Emporia Elementary School is located on South Main Street right across from the post office, isn't it? A. Yes, sir.

Q. Main part of the town? A. Yes, sir.

Q. The Belfield School is located something like two or three miles north of the town and back off an established road probably about a quarter or half of a mile? A. Yes, sir, I think that is correct.

Q. It was the last school that was built? A. Yes, sir.

Q. And it has never been populated by anyone but Negro children, I mean no white children have attended that school? A. I don't know, but I think that is correct.

George F. Lee—for Plaintiffs—Recross

Q. Isn't it generally considered that the school was built as a Negro school? A. Yes, I think it is, yes, sir.

[133] Q. All right, let's look at the Zion located something like a mile and a half southeast of Emporia. A. Yes, sir.

Q. In the county.

Are you familiar with that site? A. Yes, sir.

Q. Are you familiar with the fact that it was a very low piece of ground, a swampy type ground that was selected by the School Board to build a school on for— A. County School Board, yes, sir. Yes, sir. I agree it is a poor site.

Q. Very poor site.

Then the other school was located to the west of Emporia about a mile or so south of a subdivision known as Washington Park, which I believe might stir some memories in His Honor's mind, I don't know. As a matter of fact it was off an established road also? A. Yes, sir.

Q. So that a roadway had to be cut through to even get to the school? A. Yes, sir.

Q. Now, that was also built as a former Negro school? A. Yes, sir.

[134] Q. Zion District School built for Negro school? A. Yes, sir.

Q. So that really they are all inferior sites? A. Yes.

Q. And in back out-of-the-way places, that is a fact? A. I would say that was a fact.

Q. Now, comparing even the plants themselves with Emporia Elementary School, is there anything that compared about these schools, elementary schools, that would be relieved for the county that at all compare favorably with the Emporia Elementary School? A. They are newer buildings. I visited all of them when they had dedications. I have made talks at each one.

George F. Lee—for Plaintiffs—Recross

Q. Newer buildings, but are they as attractive? A. Well, you mean from a physical thing?

Q. From appearance? A. I would say no, because they are not as large, of course.

Q. As a matter of fact Emporia Elementary School is the only Emporia Elementary School that has an auditorium?

A. Yes, sir.

Q. Which also doubles for civic functions and the [135] like? A. Yes, sir.

Q. And Greenville County Training School has an auditorium? A. Yes, sir.*

Q. No other school in the county has an auditorium? A. Greenville County is the one that we would not need.

Q. But that is the one you say is in very bad condition? A. Yes, sir.

Q. For all practical purposes the only real serviceable auditorium is in the Emporia Elementary School? A. Yes, sir.

Q. Is there any facility that the Emporia Elementary School does not have that a modern elementary school should have? A. I couldn't answer that because I am not an educator. The other schools are certainly more modern in Emporia.

Q. More modern in the sense they have been built recently? A. Cleaner, lights, all that business.

[136] Q. In the sense of having the equipment and so forth? A. I am sure they have the equipment. It would be the same.

Q. I see.

I think that is enough.

The Court: Any other examination?

Mr. Warriner: One other.

*George F. Lee—for Plaintiffs—Recross**Further Examination by Mr. Warriner:*

Q. Will you, Mr. Mayor, by utilizing Emporia Elementary School deny any citizen of the City of Emporia on account of his race any right? A. Absolutely not. This is what we hope to accomplish.

Q. Thank you.

The Court: Mr. Lee—

The Witness: Yes, sir, Your Honor.

The Court: —I take it from what you have said, and I hope I am not simplifying it too much, that you have little confidence in the Board of Supervisors of the county?

The Witness: Very definitely, sir.

The Court: I gathered that you feel the same way about the School Board because, if I understood you correctly, [137] you said you doubted their ability to operate a unitary system?

The Witness: No, sir. I have a great deal more respect and confidence in the School Board. I haven't much for the county. In fact one of them just had to leave his seat.

The Court: But you still don't believe they can operate a unitary school system?

The Witness: Not an efficient one, no, sir.

The Court: Now, you obviously, as everybody in the world apparently knew, this matter has been before the court for well over a year?

The Witness: Yes, sir.

The Court: You knew that the people affected including the citizens of your city and students were going to be involved in a change of school plans for over a year?

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The Witness: Yes, sir.

The Court: Isn't that correct, sir?

The Witness: Yes, sir.

The Court: And did you know that the Superintendent of Schools had asked for an extension to prepare a plan stating that he couldn't get it up?

The Witness: Yes, sir. We read that in the papers, yes, sir. I was quite aware of that, yes, sir.

The Court: How many times did your School Board [138] meet with the School Board of the county, or ask to meet with them in discussing the plan to be submitted to this Court commencing back in whenever we met last year, which I believe was June or July, perhaps August?

The Witness: Since it was a moot Board I don't believe they have ever discussed it.

The Court: When you say a moot Board, the truth of the matter is, whether it be by virtue of your contract or not, your School Board for all practical purposes—

The Witness: Yes, sir.

The Court: —has functioned only because you were required by law to have a School Board?

The Witness: Yes, sir.

The Court: Is that—can I stop right there?

The Witness: Yes, sir, that is correct.

The Court: That is the only purpose.

The Witness: Well, because we could not establish equities with the county. That is correct, yes, sir.

The Court: I understand.

Now, where would you get a Superintendent of Schools?

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The Witness: Well, sir, we have an application right now before the State Board. They meet in Williamsburg on [139] the 20th of this month, I believe, to try, and I might get my terminology wrong, there is a difference between a division and a district.

The Court: I don't understand it myself.

The Witness: Under the state law we can operate our system with the County School Superintendent working for us as well as working for the county.

The Court: You would need his cooperation to do that? You would need the County School Board's cooperation and perhaps even the supervisors', is that correct?

The Witness: Yes, sir, we need the School Board. I think we will get that.

The Court: They have got to help you to take it?

The Witness: Yes, sir. We will need their help, and I think we can get that.

The Court: The same about teachers. Have you got teachers now?

The Witness: Yes, sir.

The Court: Now, you already have them?

The Witness: No, we don't have them now, but we have teachers available, sir.

The Court: Did you know, or did your School Board know, that this plan that was approved by the Court is subject [140] to change at any time? Did you know that, sir, or did you all?

The Witness: No, sir.

The Court: Or are you under the erroneous impression that that is it?

The Witness: I am a layman and I thought that was it.

E. V. Lankford—for Plaintiffs—Direct

The Court: You think the School Board is under that impression too?

The Witness: Yes, sir.

The Court: It is erroneous.

The Witness: Thank you, sir.

The Court: All right, gentlemen.

Did the Court's questions prompt any other examination of the witness?

Thank you.

(The witness stood aside.)

Mr. Marsh: Mr. Lankford.

E. V. LANKFORD, JR. was called as a witness by and on behalf of the plaintiffs, and having been first duly sworn, was examined and testified on his oath as follows:

Direct Examination by Mr. Marsh:

[141] Q. Would you state your name and address? A. My name is E. V. Lankford, Jr. I live in Emporia, Virginia.

Q. Mr. Lankford, what is your position with the Emporia City School Board? A. I am a member of the School Board and was duly elected Chairman of the School Board.

Mr. Marsh: Your Honor, counsel have agreed that the three items requested of Mr. Lankford could be admitted. I think the next number is 23.

It will be the minutes of the meeting of the Emporia City School Board of July 17, the meeting of the Emporia City School Board of July 30, 1969, and the meeting of the Emporia School Board of August 5, 1969.

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(The document referred to was received in evidence as Plaintiffs' Exhibit No. 23.)

Mr. Kay: All one exhibit.

Mr. Marsh: No. 24 would be a letter addressed to Mr. Slate, Chairman of the County School Board, from you, Mr. Lankford, as Chairman of the City School Board as No. 24.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 24.)

Mr. Marsh: I show you, which was not furnished [142] by you, a copy of a notice to all citizens of Emporia, and to residents, indicating that children who live out of the city and want to attend a city school could be admitted. This would be No. 25.

(The document referred to was received in evidence as Plaintiffs' Exhibit No. 25.)

Mr. Warriner: If Your Honor please, I am not sure of the implication. Was that this was requested and refused?

The Court: No, I gathered this is not—

Mr. Marsh: It was not requested.

Is that a notice that your Board caused to be issued, sir?

The Witness: Yes, sir, this was sent to all the water customers of the City of Emporia.

By Mr. Marsh:

Q. That would be 25? A. I say the water customers because that was the only mailing list available.

Q. Mr. Lankford, other than those three meetings for which we have minutes did your Board have any other meetings, sir? A. Yes, sir.

E. V. Lankford—for Plaintiffs—Direct

[143] Q. What other meetings? **A.** We were appointed some time during the month of August, 1967. We met, I can't recall whether it was officially or not, whether it was unofficial, but we met on numerous occasions to attempt to seek a separate school system for the City of Emporia.

The Court: Commencing when?

The Witness: Commencing as soon as possible, sir.

The Court: I mean when did you first meet for this purpose, to establish a separate school system?

The Witness: Some time in the latter part and during the latter part of 1967.

By Mr. Marsh:

Q. Did I request you, sir, to bring copies of complete minutes of each meeting since January 1, 1968? **A.** Yes, sir.

Q. The only minutes you brought were the minutes of those three meetings which were just admitted? **A.** Those are the only ones in the file.

Q. Have you had any meetings for which you did not bring the minutes, sir? **A.** The only official meeting that could have been had was a joint meeting with the County School Board to carry out our **[144]** appointment of a superintendent.

The Court: Mr. Lankford, I think the point that we are trying to establish, I may be wrong, but has the Board met for the purpose of attempting to operate a separate school system, and if you met I assume you take minutes, and that is what we are talking about. Have you done that prior to this litigation?

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The Witness: I say we did in the latter part of '67.

The Court: Then you would have minutes of that meeting, would you not?

The Witness: I assume the minutes are in the files.

The Court: Who keeps the minutes?

The Witness: The clerk.

The Court: Would the Superintendent of Schools have been there, or anybody else?

The Witness: No, I do not think the superintendent would have been there.

The Court: But you don't have those minutes with you?

The Witness: No, sir.

By Mr. Marsh:

[[145] Q. But you did not meet during 1968? A. Apparently not. There are no minutes in the file.

Q. You did not meet during 1969 until the first date which was in July? A. That is correct. Except there had to be a meeting jointly with the County School Board to reexecute Mr. Owen's contract.

The Court: Wouldn't Mr. Lee have been at these meetings that you are referring to about meeting for a separate school system, Mr. Lankford?

The Witness: Not that I know of, sir.

The Court: The Mayor wouldn't be there?

The Witness: Not as a matter of course.

The Court: But all the School Board members would be there?

The Witness: Should be there, yes, sir.

The Court: All right, sir.

*E. V. Lankford—for Plaintiffs—Direct**By Mr. Marsh:*

Q. Mr. Lankford, you are aware of the schools that would be remaining in the county? A. Yes, sir.

Q. If your City School Board took the Emporia Elementary School and the Greenville County School—[146]

A. If we, yes, sir.

Q. You are aware of the fact that the only high school would be the Negro high school? A. The Wyatt High School.

The Court: Mr. Lankford, are you aware if you all do this it is going to have an effect on the Greenville County School System? It is bound to, is it not?

The Witness: Yes, sir, we remove pupils and money.

The Court: It is going to make it rough on them, isn't it?

The Witness: Well, we would be removing pupils and financial support.

The Court: It is going to have an effect?

The Witness: Yes, sir.

The Court: An adverse effect, isn't that correct?

The Witness: I can't speak for everyone.

The Court: You are going to take some of their teachers, aren't you?

The Witness: Surplus, yes, sir.

By Mr. Marsh:

Q. As a matter of fact you presented in the figures to the joint meeting, you presented the figures showing the [147] percentages and the number of Negroes and white pupils in both jurisdictions, is that correct? A. Both in a county system as currently and in the city system.

E. V. Lankford—for Plaintiffs—Direct

Q. Those figures showed that the percentage of Negroes, if the city withdrew its pupils, the percentage of Negroes in the remaining system would be about 70 per cent, sir; it would increase the percentage of Negroes in the remaining county system? A. I would think that would be true, yes.

Q. Would it reduce the percentage of experienced now by the city pupils under the Court's order? A. It would reduce to some extent.

Q. I believe the percentage is about 50 per cent the Mayor testified in the city, is that your recollection? A. We believe it to be 50-50. May I add something to that?

Q. Certainly. A. We do not know how many white children have been lost to the private schools so we have no way of determining the exact number of children for that matter that will attend.

Q. And your understanding of the percentage in the county is it is about 70 per cent? [148] A. That would remain in a pure county system. I assume that would be approximately correct.

The Court: Mr. Lankford, before I forget. When do you contemplate opening school?

The Witness: As soon as possible. Of course in September.

The Court: Well, do you have a specified date?

The Witness: The specified date, as I understand it for the school system is—

The Court: I mean for the new system that you are contemplating.

The Witness: Your Honor, of course our primary obstacle is the buildings into which, the city buildings into which to house the system. If those buildings were to become available to us prior to the end

E. V. Lankford—for Plaintiffs—Direct

of August I would estimate we could have a school system in operation by the end of September.

The Court: What you are telling me is everything is iffy because you don't know whether you are going to have the buildings and you don't have the teachers, you don't have a Superintendent of Schools. Isn't this correct?

The Witness: We have a Superintendent of Schools, yes, sir.

The Court: You have hired one?

[149] The Witness: Yes, sir.

The Court: Who have you hired?

The Witness: The City of Emporia and the County of Greensville is a single school division. Now, a school division has a superintendent who is Mr. Owen.

The Court: Who could perhaps three or four different school systems if they happened to be in the division, is that correct?

The Witness: As I understand it, yes, sir.

The Court: So you feel that you have a superintendent?

The Witness: We know we have a superintendent, yes, sir.

The Court: But you don't have the first school teacher?

The Witness: No, sir, not on contract.

The Court: You don't have the first building?

The Witness: Not designed for a school, no, sir.

The Court: You don't have the remotest idea what date these children will start to go to school?

The Witness: That is correct.

The Court: All right, sir.

*E. V. Lankford—for Plaintiffs—Cross**By Mr. Marsh:*

[150] Q. Mr. Lankford, I don't think you testified to this. Did your Board, the School Board, seek to intervene in the pending litigation in Federal Court which has been pending since 1965? A. No, sir, we were not. As a School Board we had nothing to do with the County School Board. We would never meet. The only two times that the Boards ever acted jointly is to hire the superintendent.

Q. You and the members of your Board were aware of this litigation? A. As individuals, yes, sir. I am reasonably sure the rest did.

Q. Did your Board ever in any of its meetings ever pass any resolutions pertaining to asking the County Board to bring about complete integration of the school system, to bring about a unitary school system? A. No, sir. We had nothing to do with the county system.

Q. Have you or any members of your Board publicly advocated an integrated school system and abolition of freedom of choice? A. No, sir, not that I recall.

Q. Have you as an individual ever advocated that [151] publicly, sir?

Mr. Warriner: If Your Honor please, I think this is going beyond the scope of the inquiry as to what this individual might have advocated somewhere else. He is not here as an accused.

The Court: I think so too, Mr. Marsh. I think I understand the situation.

Mr. Marsh: No further questions of Mr. Lankford.

Cross-Examination by Mr. Warriner:

Q. Is it not correct, Mr. Lankford, that you, the Mayor, the City Council, have publicly, at public meetings with the

E. V. Lankford—for Plaintiffs—Cross

press present and with citizens present stated your purpose, your desire and your intent to form a unitary school system for the City of Emporia operated without regard to race? A. Yes, sir.

Q. Has this been covert or overt, open and outwardly?
A. Open and outwardly.

Q. Have you attempted to hide it? A. No, sir.

Q. You were asked a question by Mr. Marsh which I understood your answer to be contrary to that, if my understanding was correct, or were you incorrect? [152] A. I can't recall the question at the moment.

Q. I believe he asked you whether you had ever publicly advocated a unitary school system, and my question was have you not publicly stated your intent and purpose to operate a unitary system? A. Yes, sir.

The Court: That is since this Court order, isn't that correct? Isn't that what you mean?

The Witness: Publicly as a member of the local City School Board.

The Court: Since this Court ordered it, just in the last month?

The Witness: Yes, sir.

By Mr. Warriner:

Q. The Mayor has also done that? A. Yes, sir.

Q. The mailing list for that registration notice for the city schools, was that mailed to any select list, that is any racially select list? A. No, sir. They were the water customers, which is an automatic mailing system.

Q. Was that information also published over the radio? [153] A. Yes, sir.

E. V. Lankford—for Plaintiffs—Cross

Q. I assume that is also a non-racial beam from the radio? A. Yes, sir.

Q. There has been no attempt, I take it then on the part of your School Board to make any plea or ploy or other act which is racial in its effect insofar as registering for the school system? A. No, sir.

Q. I understood from your testimony that in the early part of your existence, from August, September, October, 1967, that your School Board met formally and informally, to the best of your recollection for the purpose of considering the formation of a separate school system? A. Yes, sir. We are charged by state law to establish a school system. And as we were appointed we met to that end.

The Court: Well, what made you so happy until now? You were satisfied. You have been charged with that since 1967. You just turned it over to the Greenville County and you didn't complain. What happened now that you have decided at this last minute?

The Witness: I personally, and I think my School [154] Board since we were formed two years ago have never been happy.

The Court: But you didn't do anything about it?

The Witness: True. The contract was signed.

The Court: Tell me why now? What is it now that you decided that you all ought to do something?

The Witness: We feel that within the City of Emporia we can operate a consolidated system within two buildings.

The Court: Haven't you felt that for two years?

The Witness: Yes, sir.

The Court: But you didn't do anything about it?

E. V. Lankford—for Plaintiffs—Cross

The Witness: We were forced into a contract.

The Court: Well, you still have that contract, haven't you?

The Witness: Yes, sir, we do.

The Court: What has changed then, Mr. Lankford? That is what I want to understand.

The Witness: The fact that our pupils in this city will go to six different school buildings before they finish school.

The Court: You mean assuming the plan is never changed?

The Witness: Assuming the plan is never changed.

[155] The Court: Of course you knew the plan had been changed in a matter of several weeks recently. You knew one plan was ordered and then another plan submitted and approved, so you knew it was subject to change?

The Witness: I suppose it is subject to change, yes, sir.

The Court: All right, sir.

The Witness: But we knew nothing but what had been publicized.

The Court: Did you ever go to the Public School Board and say, "Here, consider this plan"? You all didn't do anything, did you?

The Witness: We are not legally a part of the school. You mean as an individual did I go?

The Court: Well, even as an individual. But I am not concerned with that. I am concerned with you as a School Board. Did the School Board ever meet and say, "Let's suggest this to the superintendent." I understood from your statement that he works for you?

E. V. Lankford—for Plaintiffs—Cross

The Witness: No, sir, we did not. State law provides that we shall meet only to hire the superintendent.

The Court: Then you really haven't been a School Board except for purposes of hiring a superintendent?

[156] The Witness: In a sense that has been the only official action except for signature on a contract.

The Court: If you did it now you would become a School Board all of a sudden?

The Witness: Yes, sir.

The Court: And it is going to have a deleterious effect on the students of Greenville County because you are going to take some of their superintendents and he will be responsible to two Boards and take buildings that they have been using, isn't that correct?

The Witness: That is correct.

The Court: You consider that neighborly, Mr. Lankford?

The Witness: In a sense I suppose not, Judge.

The Court: As a matter of fact it is going to change the racial composition of the student population of Greenville County, which let's call it what it is, that is one of the problems in segregating schools, isn't it?

The Witness: Yes, sir.

The Court: All right.

Thank you.

By Mr. Warriner:

Q. Mr. Lankford, if the city forms its own school [157] system will there be more teachers under contract to the county than the county needs? A. Yes, sir.

E. V. Lankford—for Plaintiffs—Cross

Q. Would it be a benefit or a detriment to the county to relieve them of the obligation of paying those teachers' salaries? A. Financially I certainly feel it would be beneficial.

Q. If the city forms a school system will the county have more school buildings than they need? A. I assume that they will.

Q. Would it be a benefit or a detriment to the county to relieve them of the obligation of maintaining those school buildings? A. It would be a benefit.

The Court: These are all subject to the teachers agreeing to have their contracts abrogated?

The Witness: That is correct.

The Court: But it could be a detriment if the teacher said, "You hired me and you are going to pay me"?

The Witness: That is true, yes, sir.

By Mr. Warriner:

Q. Do you have any reason to believe that there would [158] be a substantial number of teachers, in fact any teachers who would say, "You hired me, you pay me. I am going to stay here whether you need me or not." Do you have any reason to believe there would be teachers that would behave that way? A. No, sir. Now, I am not on the County School Board.

Q. You know teachers and you know people. Do you think people would behave that way in your city of Emporia? A. No, sir.

The Court: Well, your city then is different than the county, I take it. The county hasn't treated you fairly. Do you feel that way?

E. V. Lankford—for Plaintiffs—Cross

The Witness: Pardon?

The Court: Do you feel the county has not treated the city fairly?

The Witness: Yes, sir.

The Court: Do you think folks in Emporia are different than the folks in Greenville County?

The Witness: They are all human beings. They may act differently on occasions.

By Mr. Warriner:

Q. Now, I want to know, sir, what adverse effect, what adverse effect are you talking about when you say that [159] there would be an adverse effect on the county? A. I don't know that I could answer that. The adverse effect. The question to which I answered that this would be an adverse effect I would like to have repeated if possible.

Q. It can be repeated. The Judge asked you whether it would have an adverse effect or a detrimental effect and you agreed with him. I want to know what are the adverse effects? A. Well, as you have pointed out if the county has a surplus of school teachers and these teachers are willing to terminate their contract to come to the city then there would be no adverse effect insofar as teachers are concerned.

If the county has a surplus of buildings and the buildings are no longer needed by the county and the city is willing to assume those buildings, that is no adverse effect.

Q. Leaving out the ifs, will the county have a surplus of teachers and will the county have a surplus of buildings? A. In my opinion, yes, sir.

Q. All right, sir.

Then you would have no adverse effect on the county?

A. No, sir.

E. V. Lankford—for Plaintiffs—Cross

[160] Q. What would there be unneighborly about your act? I assume that we all mean the same thing by "unneighborly." A. I am not sure. I don't know.

The Court: He means do unto others as you would hope they would not do unto you.

By Mr. Warriner:

Q. I want you to, if there is anything that is unneighborly to the County of Greenville, I want you to state it.

A. The only adverse effect as asked by His Honor, the Judge, would be the racial ratio remaining in the county.

Q. Now, at the present time I believe you testified that the ratio is approximately 60-40 in the county? A. Yes, sir, to my knowledge that is about right.

Q. And if the city formed the city school system your testimony is it would be approximately 50-50? A. Approximately.

Q. In the city? A. Yes, sir.

Q. Is this a matter of great moment to the City of Emporia? A. No, sir.

Q. Is that the motivating influence of the City of [161] A. No, sir.

Q. Did you or anyone in the City of Emporia create the racial mix that exists in Emporia and Greenville? A. No, sir.

The Court: What you are really saying, Mr. Lankford, everybody has been at you, the Council and myself and I don't mean to, but I want to get it straight. What you are really saying is that the reason that precipitated this, and the primary reason, is the fact that your children and all the chil-

E. V. Lankford—for Plaintiffs—Cross

Children have got to transfer schools more frequently than they have in the past and you consider that to be bad?

The Witness: I consider that to be bad, yes, sir, and the—

The Court: I am certainly in accord with you that it is not the best thing, but that is really the reason, is it not?

The Witness: That is the basic reason that we wish to operate our city school.

By Mr. Warriner:

Q. Well, what are some of the other reasons? A. The economies that would result from the lack of transportation necessity would certainly allow us to afford a better quality of education with more teachers and guidance [162] counsellors, etc.

Q. Do you have, Mr. Lankford, have confidence in the ability of the county government successfully to operate a unitary school system? A. No, sir, I do not. Successfully.

Q. Of course you understand that they are going to comply with the order and obey the law? A. City?

Q. The city. Your contention is then that operating in southside Virginia in the City of Emporia and the County of Greensville a unitary school system requires something more than mere obedience to the law? A. Yes, sir.

Q. What are some of the other things it requires? A. I would think a firm leadership is required.

Q. Do you think the county has firm leadership toward creating a unitary school system? A. I do not.

Q. Do you think the city has? A. I do.

Q. Go ahead, sir. A. It will have the people.

E. V. Lankford—for Plaintiffs—Cross

Q. Do you think the people in the county of Emporia [163] have the will to create a unitary school system? A. You mean the city?

Q. Do you think the people in the county have the will you deem necessary to create a successful unitary school system? A. No, sir, not to the extent that in the city exists.

Q. Sir? A. Not to the extent that it will in the city.

Q. Do you think the people in the city have the will to create a successful unitary school system? A. That has been demonstrated with comments to me and others, yes, sir.

Q. Go ahead, sir. A. That is all. I think they do.

Q. Are there any other reasons why you want to tell the Court why, or whether or not you want to tell the Court why the City of Emporia believes that it is in the better interests of the children in the City of Emporia to have a unitary non-racial school system in the City of Emporia?

A. The consolidation, as the Judge mentioned. The unitary system. The betterment of educational opportunity due to economies that will be a result of our school system is what [164] I have to say.

Q. Do you have any opinion as to whether the citizens of the City of Emporia would be more willing to subject themselves to higher taxes for the use of the schools than might be true in the county? A. Yes, sir, I think that is a definite possibility.

Q. Now, the Court mentioned that there were certain ifs, or that this was an iffy situation. Can those ifs be resolved here today? A. I would think so, yes, sir.

Q. How would they be resolved? A. It has been expressed by those officials of the county that they are unwilling to release any buildings that are currently included

E. V. Lankford—for Plaintiffs—Cross

within the Federal Court ordered plan. If such a plan can be revised to include the placement or the assignment of the county pupils to certain buildings then we feel that the county will then be in a position to allow the buildings that we want to utilize to be used by us.

Q. In other words, if the Court were to enter an order today denying injunctive relief and giving leave to the county to file a plan which would use these schools located in the county or leave at least the two schools that are needed by the city free for use by the city, if negotiations could be [165] successfully reached then do you see any reason why you would not be able to proceed to have a school system in the City of Emporia starting operations some time by the first of October? A. I see no reason, sir.

Q. In other words, all of the ifs hinge actually on the action of the Court here today? A. Apparently so, yes, sir.

The Court: When is school scheduled to start now, Mr. Lankford?

The Witness: The county school system?

The Court: Yes, sir.

The Witness: I believe it is the day after Labor Day. The third of September, I believe.

By Mr. Warriner:

Q. You could have your school operating then within two or three weeks after that? A. I would certainly think so, which will allow us sufficient time for the state required 180 days of education.

Q. To get 180 days of education in before the middle of next summer? A. Before the hot weather anyway, yes, sir.

E. V. Lankford—for Plaintiffs—Cross

Q. And if the Court enters that order today do you have any question in your mind that you could obtain the [166] teachers necessary? A. I do not.

Q. You are familiar with the people involved? A. Yes, sir.

Q. How big is Emporia? A. Population-wise approximately 6,000, I would say.

Q. Do you know most all of those people? A. I feel I have lived there all of my life and I don't know them, but they know me or I think I do.

Q. Do you believe that you know most or all of the teachers in the Emporia school system, black and white? A. I probably don't know as many black as I do white. I know most of the white teachers.

Q. Do you know a substantial number of the black? A. I know several of the black ones, yes, sir.

Q. Do you have any reason to believe that they would, if in covering that again, could you sit here today and set a reasonable date for the commencement of school provided you get an order from the Court permitting the City of Emporia to operate a city school system? A. Once that Court order is established our only time element between would be, as I see it, a teacher contract which, as expressed by the superintendent, has a 15-day [167] termination clause. So that there would be at least 15 days before a new contract.

The Court: What do you mean 15 days' termination? You mean by mutual agreement?

The Witness: Yes, sir, as I understand it, sir.

The Court: All right.

Rather than 30 days. I think it was 30 days last year and it is 15 days this year, possibly.

E. V. Lankford—for Plaintiffs—Cross

By Mr. Warriner:

Q. Have you had any indication from any teachers that they would be willing to transfer to the Emporia city school system provided they were released from their contract? A. I have, sir.

Q. You know that you are charged under the statute with the responsibility of operating the city school system and to a large extent they will be a success or a failure depending upon whether or not you discharge your duty. Are you confident that you and your School Board, if given leave to do so by the Court, can operate an efficient, effective city school system for the City of Emporia commencing in the fall of '69? A. I am confident of that, sir.

Q. Thank you.

[168] The Court: Gentlemen, any further examination of Mr. Lankford?

Mr. Marsh: No. We have no examination.

The Court: Thank you, Mr. Lankford. You may step down, sir.

(The witness stood aside.)

Mr. Marsh: Your Honor, the plaintiffs rest.

The Court: Very well.

Do you have any evidence, gentlemen?

Mr. Warriner: Wouldn't you pardon us one second.

The Court: If it would make it easier I could recess for lunch at this time while you formulate your plans. I will be glad to accommodate you. We will recess for one hour for lunch.

(A recess was taken at 12:25.)

George F. Lee—for Defendants—Direct

Mr. Warriner: If Your Honor please, we would like to call Mayor Lee as the respondents' witness.

The Court: Come around, Mr. Lee, please, sir. You are still under oath.

GEORGE F. LEE resumed the stand and testified further as follows:

Direct Examination by Mr. Warriner:

[169] Q. Mayor Lee, under the presently existing system would you state whether or not the city government or the citizens of the city have any control over the operation of the school system to which their children would be sent?

A. Absolutely none. May I add to this, sir?

The Court: All right, sir.

The Witness: This is a problem. We have no control over the curriculum and no control over how the program is going to operate. We have no control over the hiring of the teachers. Absolutely no control whatsoever.

By Mr. Warriner:

Q. Do you have any control in the selection of the members of the Board of Supervisors? A. Absolutely none.

Q. Do you have any control over the selection of the members of the School Board? A. No, sir.

Q. Do you have any control over the setting of the tax levy? A. No, sir.

Q. Do you have any control over the setting of the school budget? A. None whatsoever. In fact we pay our bill to the **[170]** county and not to the School Board itself. We

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assume it goes, some of it goes for schools, but, of course, a portion goes for our share of health, welfare, etc. But we have no control. We have a blanket bill from the county.

Q. Now, completely aside from the question of whether or not you have any legal control or opportunity to be heard, just a minute and I will revise that. I use the word "control." I will go back and say, "Do you have any vote in any of these matters?" A. We can't even vote for the members of the Board of Supervisors.

Q. Can you vote on any of the other matters I have enumerated? A. Absolutely no control whatsoever.

Q. Completely aside from your opportunity to, vote or exercise any control or influence, do you have over and beyond political lines of command, do you have any influence that you can exert over the operation of the schools by the county? A. None whatsoever. Unfortunately we do not have a line of communication from the County Board of Supervisors. In fact we had a reassessment this past year and we attempted to go over, since we are a city of the second class and we did [171] not have the records and the land books. We attempted to go over and send our crew to get those records. We were refused by the Commission of Revenue and had to get a Court order from the Attorney General in order to get public records. This is the line of communication we have, which is available to anybody.

Q. But was not made available to the city? A. No, sir.

Q. Is there an active atmosphere of antagonism between the county government and the city government? A. Absolutely.

Q. How long has this persisted? A. This has been going on for the past eight years, I would say, unfortunately.

Q. That has hampered the city government and before that the town government in attempting to exert a beneficial

George F. Lee—for Defendants—Direct

influence on the county government? A. Yes, sir, it has very definitely:

Q. I will leave out the word "beneficial influence." Has it had any influence on the county government? A. Yes, sir. There is no line of communication, unfortunately.

Q. Now, Mr. Mayor, all of these things were true on [172] the 24th of June as well as on the 26th of June, is that not correct? A. Yes, sir.

Q. Now, would you explain to His Honor why the fact that there was an order entered in this case between the County School Board and the N.A.A.C.P., why that acted as an agency which moved?

The Court: Wait a minute. Let me get this straight. What is this N.A.A.C.P.? They are not parties to this suit as far as I know. All I know about the N.A.A.C.P. is something that I read in the paper, frankly.

Mr. Warriner: There are large numbers of names of people and it is our understanding that their counsel are employed by some legal defense fund of the N.A.A.C.P. and it is a shorthand way of saying the whole bunch of names.

The Court: What is the materiality of it? I want to get it straight because I did read something about this Court approving the plan of the N.A.A.C.P. If they are parties, I don't know it.

Mr. Warriner: The purpose of the use of the term was for identification.

The Court: Who are you attempting to identify?

Mr. Warriner: Identifying the suit between [173] certain people starting off with a Miss Pecola Annette Wright.

George F. Lee—for Defendants—Direct

The Court: You mean between the plaintiffs and the defendants?

Mr. Warriner: That is correct.

The Court: All right.

Mr. Warriner: That is certainly—

The Court: I don't think it is material one way or the other, but I heard something about N.A.A.C.P. and I wanted the record to show this Court doesn't know anything about it.

Mr. Marsh: N.A.A.C.P. is not a party to this.

The Court: I didn't think so, but I wanted it straight for the record.

All right, sir.

By Mr. Warriner:

Q. Between the plaintiffs and the defendants, who are Miss Pecola Annette Wright and the County School Board, what was it about the order that was entered that changed the situation which galvanized the city into action? A. Which order are you talking about, Mr. Warriner? The first order or the second order?

Q. The order entered on the 25th of June, I think it was.
[174] A. Is that the first one or the second one?

Q. Maybe I better check it.

It was the order that was filed with the supplemental complaint.

Mr. Tucker: June 25.

The Court: Isn't that the order that approved the plan submitted by the Greenville County School Board?

Mr. Warriner: If Your Honor pleases, as I understand it I assume Your Honor is asking, as I under-

George F. Lee—for Defendants—Direct

stand the Greenville County School Board merely made some physical rearrangemnts of the order that was submitted or directed by the Court in order to accommodate children to classrooms and—

The Court: That may have been the result, but weren't we in court when they appeared here and asked the Court to approve their plan, which this Court did? And that was done on June 25. That is the plan, as I understand it, that was submitted by the School Board. Is that correct, Mr. Kay?

Mr. Kay: It would appear to me from this Court having considered the proposed plan filed by the plaintiffs here and being of the opinion that the same will lead to a unitary system—

The Court: That is the order of the 25th?

Mr. Gray: That is the plaintiffs' plan.

[175] The Court: That is not the plan we are operating under now. We are operating under a plan submitted by the Greenville County School Board.

Mr. Gray: That was much later.

The Court: You are talking about the first plan, in any event, which was approved and then ultimately amended at the request of the defendants?

Mr. Warriner: I think that perhaps the best thing to do is just use the dates, the 25th of June.

The Court: I think so.

Mr. Warriner: Because it was some time shortly after the 25th of June that the city started taking action.

Now, what I want to know, was what was there about the nature of the occurrences in the suit between the plaintiffs and the defendants, and you know what suit I am referring to—

George F. Lee—for Defendants—Direct

The Witness: Yes, sir.

By Mr. Warriner:

Q. —that resulted in action being taken by the city? A. The city has never been happy with the school system period. And a member of the School Board, not the Chairman, but at the first meeting he went and informed the [176] School Board, and he is present in this courtroom today, informed the County School Board, the full County School Board in 1967 or 8, whenever he went, that he wanted to work, and he was going to make efforts to make a separate system. We have never been happy with the system, but our children were going to school, all of our children in close proximity to where they lived. And this is what precipitated this action because now with this transportation problem and two or three buses picking up children—

The Court: You mean none of the children in Emporia went out into the county to school?

The Witness: Yes, sir, some did. Yes, sir, but this was—we are talking about, sir, less than a mile.

By Mr. Warriner:

Q. Mr. Mayor, the R. R. Moton, the high school which was formerly an all-Negro school, is located on the very edge of Emporia to the north, is that correct? A. Yes, sir.

Q. But outside? A. Yes, sir.

Q. And the other high school which is the Greenville County High School, which was a formerly all-white school, is located on the very edge of Emporia to the south but inside? [177] A. Well, in fact part of the playground is in the county.

George F. Lee—for Defendants—Direct

Q. And so far as their proximity to the center of Emporia, there is practically no difference? A. Very little.

Q. And if any children, I think perhaps emphasis was made, that there may have been some Negro children who traveled outside of the city to school. If they did it was on the immediate edge of the city to the high school? A. I would assume that, yes, sir.

Q. During the course of the examination and cross-examination, Mr. Mayor, there have been a number of reasons stated to the Court why the city would be better off having its own city school system and its children would be better off. I take it from your answer then that all of these reasons apply and the precipitating act was the fact that the schooling was being fragmented into groups of two and three grades in a school building requiring excessive transportation of city children, is that correct? A. That is correct. And if the Judge would allow me to elaborate and present an example.

The Court: Go ahead, sir.

The Witness: You will take for instance we have [178] in Emporia and Greensville County an excellent band program. If we had all of the children between the ages of school ages of first grade through seventh grade in one school then we can have one band director, for instance, and he can direct each one of those children. They have a little band. He can direct each one of these children and we can have an excellent band program. I use that as one item. But if he is, that one man, we have to have five to go from school to school to school just to have this extracurricula type of thing. And I think this is why we need to keep all of the children

George F. Lee—for Defendants—Direct

in the city together. And then we can have expanded programs that we don't presently enjoy. And we have had no voice whatsoever in the programs that have existed in the past.

By Mr. Warriner:

Q. I assume, Mr. Mayor, that you read the newspaper?

A. Yes, sir.

Q. And that you were aware one plan after another and various modifications of these various and sundry plans were being presented to the Court in this case according, at least, to the newspapers? A. Yes, sir.

The Court: But we already know they are not [179] accurate because they said something about N.A.A.C.P. and I saw that, and that is not true. Don't hold this witness to the newspapers' responsibilities. Don't hold him responsible.

The Witness: No, sir.

Mr. Warriner: I don't intend to, Your Honor.

The Witness: Thank you, sir.

By Mr. Warriner:

Q. I ask whether or not you read it? A. Yes, sir, I read them all.

Q. Was it also your understanding from a reading of the newspaper that the Court finally finished up with a plan that was a final plan? A. Yes, sir.

Q. Were you aware of the fact that the Court always reserves the right to change an order? A. No, sir. This was a surprise to me. No, sir.

Q. Did you have any reason after the reading of the history of the case as it went through court to believe that

George F. Lee—for Defendants—Direct

after finally deciding on this order that the Court was going to change it? A. No, sir, I had none whatsoever.

Q. Were you required then to act upon the facts in behalf of the City of Emporia as they existed and as they [180] appeared to you? A. Absolutely.

Q. Is that the reason— A. That is absolutely.

Q. —or the basis upon which the Council acted as far as you know? A. I thought this was the final and complete action and couldn't be changed.

Q. Are you asking the Court now to change it in order for the City of Emporia to have a school system? A. Your Honor, I am pleading with the Court. If I can elaborate again.

The Court: Mr. Lee, let me say that I don't want to cut you off and I am going to let you do it.

The Witness: All right.

The Court: I am sure what you are saying you are perfectly sincere in.

The Witness: Yes, sir.

The Court: Let's call a spade a spade.

The Witness: All right, sir.

The Court: It is a little late. That is the problem. It took me from August until about a month ago to even get the Superintendent of Schools of your division to [181] submit a plan.

The Witness: But, Your Honor, sir, we didn't have any control over that. None whatsoever.

The Court: I know that.

The Witness: Never have we been asked or consulted on a plan.

The Court: Go ahead, sir.

The Witness: All right, sir.

George F. Lee—for Defendants—Direct

The Court: I didn't mean to interrupt. I wanted to let you know what the problem was.

The Witness: I am concerned first of all with the public school system, and this is the only answer. We can't go back to the dark ages. This is not a threat from me because I would never allow my child to attend one period, regardless of the outcome of this case or any other case. But I am thinking further. It has been quoted in the papers, correct here, our area is a growth area in southside and we have been getting big industry there and we think this school turmoil has so frustrated things that it is going to hurt us economically. We are going to be a dying community. But if we can have a dynamic system, school system in the City of Emporia, we are going to continue to grow and move.

I don't think this is going to hurt the county one [182] bit any more than the present plan is going to hurt the county. I don't think it will affect the county because we have got to consider right down, when you talk these things over, there is a fact that there are several hundred, I don't know how many, and it may be 100 or 200 county white children that are being bussed out to Brunswick County to go to a private academy, which I am against, but this thing, if we are not allowed to have at least one system in Greenville County for all of the citizens to go to it is going to hurt Greenville County as well as Emporia. And I don't think this plan that we are proposing will affect adversely the County of Greenville and it can be put into effect next month, Your Honor, sir, with your approval, sir.

*George F. Lee—for Defendants—Cross**Cross-Examination by Mr. Tucker:*

Q. Mayor Lee, do you know Mr. Dolphus Slate, one of the members of the Greenville County School Board? A. Yes, sir.

Q. Where does he live? A. He lives on Church Street, I believe.

Q. In the city? A. Yes, sir.

Q. Mr. Temple, another member, where does he live? [183] A. He lives in the Town of Jarrett, I believe.

Q. J. D. Adams, a member of the County School Board? A. He lives in the city.

Q. Mr. Vincent? A. Mr. Vincent lives in Skippers.

Q. Two of the four members of the County School Board live within the City of Emporia? A. Yes, sir.

Q. Do you know who the members of the School Trustee Electoral Board are? A. I don't any more. I sure don't, no, sir.

Q. All right.

Now, you testified that Wyatt was on the very edge of the town limits. Wyatt is about half to three-quarters of a mile north of the town limits? A. Yes, sir, I would say close.

Q. It is easily? A. I say half a mile.

Q. Half a mile? A. Yes, sir.

Q. Negro children living in Emporia in the southside of Emporia? A. Yes, sir.

[184] Q. Who did not elect under freedom of choice to attend the Emporia Elementary School were assigned to school where, if you know? A. I really don't know because we have had no control whatsoever over those matters.

Q. As Mayor of the city you never concerned yourself as to where the Negro children in the southside of Emporia

George F. Lee—for Defendants—Cross

attended school, whether they attended Zion or Moton School or Belfield School? A. Yes, sir, I have been concerned with the white and black children in Emporia ever since I have been Mayor.

Q. But you don't know where the Negro— A. I am sure they go to the Greenville Training School. Those that did not elect to go to the Greenville Elementary School.

Q. Elementary school? A. Yes, sir.

Q. How about the Negro children that attended or lived in the south part of the city, attended Zion School or Belfield School? A. Oh, I am sure some did, but again—

Q. I meant Zion School or Moton. A. Moton School, yes, sir. Certainly they did attend [185] right. It was in close proximity to areas of residence, so I am sure they attended those schools.

Q. I see.

Now, you elaborated upon an advantage of having the children of the city all in one building. And you made reference to the band. Your idea would contemplate two high schools, one for the city and one for the county. Two high schools for the area? A. Definitely.

Q. But both those high schools would be very small population-wise? A. Well, no, sir. I don't think so, sir.

Q. At least if they were together there would be a larger population in the high school? A. Well, actually, sir, if they were together they couldn't accommodate the students. The schools were built only for approximately 800 and you would have 600 in them. So that takes care of future growth.

Q. That is all right.

I noticed in the minutes of the City Council minutes of your last meeting, the matter came up with the residents of the Virginia Lee Baker subdivision seeking annexation into the city and Virginia Lee Baker subdivision is [186] located south of the city? A. Yes, sir.

George F. Lee—for Defendants—Cross

Q. Tell me whether that is populated by white or Negroes? A. There are three homes, Negroes—I mean white homes. Three homes in the area.

Q. Three homes in the area? A. Just three, yes, sir.

Q. Then there is a new subdivision being developed, is that what it is? A. Yes, sir. I don't think many lots have been sold.

Q. I notice that they are referred to as acreage. A. I think around 47.

Q. As a resident of the city do you know whether lots in that subdivision are being offered to sale to Negro people?

Mr. Warriner: If Your Honor please, the law requires they be offered to sale to anyone without regard to race, and I am sure counsel knows that.

The Court: Objection overruled.

By Mr. Tucker:

Q. As a matter of fact— A. I have no idea.

Q. —do you know who is selling them? Who is [187] promoting it? A. I know the attorney that handles the case, but that is the fact, something that has never come up as far as I am concerned. So I could not answer that.

Q. All right.

Now, I am assuming that in the several steps that the Council has made you have had advice of counsel? A. Yes, sir.

Q. Now, did your counsel advise you that the Court ordered plans to be revised and so forth as time went along?

Mr. Warriner: I think it would be properly objectionable as to what counsel advised them.

George F. Lee—for Defendants—Cross

The Court: I think that objection is well taken.

Mr. Tucker: I withdraw the question.

By Mr. Tucker:

Q. The minutes of the Council and the registration notice that was published by the School Board within recent days both refer to the fact that out of the city students may attend the city schools on a tuition basis. Do you know what the amount of tuition will be? A. It has been calculated based on the budget we received from the County School Board or from the county, rather, approximately. If any child decided to come in I would [188] say approximation of \$170 a year.

Q. Both elementary and high school children? A. Yes, sir.

Q. Now, I believe you testified, and correct me if I am wrong— A. All right, sir.

Q. —that if the two buildings that the city wants, the school buildings that the city wants could be released that the County Board would cooperate, or that you would have no difficulties or foresee any difficulties in establishing the school system. A. I don't believe we will have any difficulties at all with the County School Board. Unfortunately the Board of Supervisors don't realize that the Board controls the property. If the Court releases them we wouldn't have any problem at all working that out with the County School Board.

Q. Who would make the decision, let us say, for instance as to what teachers would go to the city and what teachers would go to the county system? A. Then I think here, as I have said repeatedly, it would be a complete unitary system. Then our City School Board then would be empowered to hire.

George F. Lee—for Defendants—Cross

Q. You don't understand me. [189] A. All right, sir.

Q. I am conceiving of the teachers presently under contract by the County School Board as being the pool from which the county teachers and the city teachers would be drawn. A. Yes, sir.

Q. I am asking you how would the decision be made as to which teachers would go to the city system and which would remain in the county? A. Two School Boards to have to go together and decide.

Q. Have you assurances from the County School Board they would get together? A. Tacit approval, yes, sir. I don't think we would have any problem.

Q. What do you mean "tacit"? Do you mean you have talked with members of the County School Board on the subject? A. I have talked with the County Superintendent on the subject and I have talked with one member of the School Board on the subject. I don't think that would be a problem at all, sir.

Q. What member of the School Board did you talk to? A. Talked with Dr. Adams.

Q. And your conversation with Dr. Adams led you to [190] believe there would be no difficulty at all in apportioning teachers between the county and the city? A. Yes, sir.

Q. All right.

May I venture to guess that you agreed that Mr. Wood would be able to make the selection and both Boards would ratify his selection? A. Yes, sir.

Q. That is your understanding of the way it would work out? A. Yes, sir. I think you would have to take it on a complete non-racial basis, and I am sure our School Board, and I am sure the county would take that recommendation with, of course, some suggestion.

George F. Lee—for Defendants—Cross

The Court: If you got along so good with the School Board why didn't you go and help them make a plan and make suggestions to them?

The Witness: Yes, Your Honor, sir, we have been dealing and we don't even send our check to the School Board.

The Court: But you talked to Dr. Adams and have tentatively agreed that you will get the teachers you need from what you said?

The Witness: Yes, sir.

[191] The Court: What I don't understand is why didn't your School Board, Emporia, sit down and talk to Dr. Adams and the other members and say that you wanted to talk to them about this plan that was being submitted to the Court?

The Witness: Frankly, Your Honor, sir, they have never been instructed by the Council to do so and I think the School Board is not at fault. I think the Council is at fault, but we weren't happy with the system we had. We were living with it, but I don't think the School Board is at fault.

The Court: What I don't understand is that you all haven't done anything all this time and now all of a sudden in a matter of days you want this Court to disrupt the plan that has taken—it was like pulling teeth—

The Witness: Yes, sir.

The Court: —to get it out of Greenville County School Board.

The Witness: Yes, sir.

The Court: And you want us to take it now and run the risk of injuring the children of Greenville County in their education.

D

George F. Lee—for Defendants—Cross

The Witness: I don't believe, sir, that as the superintendent stated—excuse me, maybe I shouldn't say that.

The Court: Go ahead. Isn't that what you are [192] asking this Court to do?

The Witness: Yes, sir, but I don't think it is going to injure the system. As the superintendent stated it is a matter of half a day since he already has your pairing plan and it has been agreed upon there is no problem.

The Court: Let's get it straight. It is not my pairing plan. It is the plan submitted by the Greenville County School Board.

The Witness: Yes, sir, excuse me, sir.

The Court: I mean I will take credit and blame, and it is there.

The Witness: Yes, sir.

The Court: But I want it straight that this Court approves the School Board plans whenever it is possible to do it.

The Witness: Yes, sir.

The Court: Because they now presumably know more about it than I do.

The Witness: This can be handled and our children won't have to go to school, white and black, with so far away from home. They can be close to their families. This is all we are asking, without harm—any harm to the county whatsoever. And the superintendent stated—

[193] The Court: You state there is no harm, but Mr. Lankford thinks there will be harm.

The Witness: I disagree with Mr. Lankford.

George F. Lee—for Defendants—Cross.

The Court: Between you and I, I do too. Go ahead.

The Witness: All right. I don't think—I mean what is the difference between 60-40 and 50-50 ratio? What is the difference? There is none. We have never talked about the race. There is no race involved.

The Court: I am not thinking about the race situation.

The Witness: I don't think that plan, our plan, will do any harm. If there is any harm to be done any more than is already done then the present plan will do.

The Court: All right, sir.

By Mr. Tucker:

Q. I assume this conversation with Dr. Adams took place after the Council's action in July of this year, or determination in July of this year to form a separate school system? A. Frankly I am sure it was. It was an off-the-cuff type of thing and, of course, it was my saying, I don't know whether I mentioned it to another member of the School Board or [194] not, "If we could just get those city school buildings we could operate a plan with no problem."

And they said, that under this Court order maybe it has been since that they were negotiating or having plans back and forth, presenting it in the meeting with the Courts, and there is nothing they could do, really. Their hands were tied until something had been done. It is an off-the-cuff type of statement that I couldn't answer, really.

Q. Well, July 9 was the first special meeting that the Council had at which you announced the purpose of the

George F. Lee—for Defendants—Cross

meeting was for, "Establishing a city school system"? A. Yes, sir.

Q. And you have had several meetings subsequent? A. Yes, sir, we sure have.

Q. Now, what I am saying is that this conversation you had with Dr. Adams was some time after this July 9 meeting? A. I really couldn't say about that and I have no assurance. I couldn't assure you, if this is what you are saying, we would get those school buildings, but I have enough confidence in all of the members of the School Board that if it is agreeable that we can operate our city school system and we would have no problem getting the School Board because the superintendent said there would be surplus property.

[195] Q. You are not suggesting that before you took the matter to the Council on July 9 with the purpose of establishing a city school system that you talked this over with Dr. Adams before you talked it over with Council? A. No, sir.

Q. So your conversation with Dr. Adams had to be after? A. I am sure of that, yes, sir.

Q. Sure.

Now, have you talked with any of the other County School Board members since July 9? A. No, sir. I can't tell you—we have had several meetings with the Chairman of the Board of Supervisors. These were informal meetings. The Commonwealth's Attorney, a couple members of the Board of Supervisors, excuse me, the Chairman of the School Board, the superintendent, our attorney, and myself.

Q. Chairman of the County School Board? A. Yes, sir.

Q. Mr. Slate? A. Yes, sir.

Q. So you have had a meeting with him? A. We have had meetings, and may I ask my attorney when those meet-

George F. Lee—for Defendants—Cross

ings were? We met in Vincent's office to try to [196] get them to present a plan that would be helpful.

Mr. Warriner: You may ask, but I can't answer.

The Court: You can answer in argument if you wish, Mr. Warriner.

The Witness: Excuse me. I am sorry, sir.

By Mr. Tucker:

Q. Let me ask you, was that meeting at which Mr. Slate was present before or after July 9, when you called the special, first special meeting of the Council for the purpose of establishing a school system? A. I honestly cannot answer.

Q. All right.

Well, at this meeting of which Mr. Slate was present was there discussed your formation or a proposed formation of a separate school? A. Yes, sir.

Q. Can we say that that was within a month, one way or the other, of July 9? A. Yes, sir, I would say so, yes, sir.

Q. Well, can we say it was before or after June 17 when this Court—when the District Court here announced that it was going to approve the plaintiffs' plan? A. I believe that would be correct, sir. Yes, sir.

[197] Q. What would be correct? A. That it would be after.

Q. It was after that? A. Yes, sir, I would say that.

Q. Now, I suppose you read in the newspaper on June 18 that the Court had announced it was going to approve the plaintiffs' plan? A. You are tying me down to dates, sir. But it was prior.

Q. You read that in the newspaper? A. Yes, sir.

George F. Lee—for Defendants—Redirect

Q. So it was after your reading in the newspaper that the Court had announced from the Bench it was going to approve the plaintiffs' plan that you had this meeting at which Mr. Slate was present? A. It was an informal meeting in Mr. Vincent's office.

Q. Will you just run over what other things have been discussed between you and Mr. Slate, you and Dr. Adams, you and other members of the School Board which is the basis of your testifying that if the matter of the buildings could be solved that you would have no other problems in establishing a school system? [198] A. Well, this is the whole sum and substance of that particular meeting. And I reported back to the Council after that meeting that members of the Board of Supervisors were there and in fact the Chairman of the Board of Supervisors was at that meeting, and this is what I was instructed by the Council to go and propose that when their finalized plan came in to establish or to put all the city children in the city and have a pairing plan for the county for the rest, just what we are asking for today. And it didn't get done.

Q. In other words, the city, is it fair to say, that in an informal manner the result of your conversation with members of the School Board, specifically Mr. Slate and Dr. Adams, that you had been given the understanding that if you can get the matter of the buildings solved that the rest of it could be worked out? Is that a fair summation? A. I think so, yes, sir. All right, I would say that, yes, sir.

Mr. Tucker: Nothing further.

Redirect Examination by Mr. Warriner:

Q. Mr. Lee, are you led to believe from what you have heard in conversation and gatherings and so forth that that

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is a unanimous view from the part of the School Board and [199] Board of Supervisors? A. No, sir, no official action whatsoever.

Q. Is it a unanimous viewpoint that the city can have the schools or are there those that say the city will have the schools over their dead bodies and so forth? A. That is correct. And we have heard it to be a fact that we will not, that we have no equity in the schools.

Q. Now, is your opinion that as a practical matter you will get the schools based upon a feeling that exists, a great deal of good will and comity between the two governments or as a practical matter that they don't have any use? A. I think it is because they don't have any use for the schools, yes, sir.

Q. And with respect to the teachers, is it because they love you and they will give you teachers or they won't have any use and can't afford them to do nothing? A. No, sir. And frankly the teachers would rather teach in our system because they know it is going to be a better one.

The Court: It is the same superintendent, isn't it?

The Witness: Yes, sir, but we will have a School Board also.

[200] *By Mr. Warriner:*

Q. Will this School Board be under the complete control of the citizens of Emporia, their government and their School Board? A. Yes, sir.

Q. How is the School Board in the city selected? A. They were selected by the City Council.

Q. How is the School Board of the County of Greenville selected? A. I believe by a trustee appointed by the Court.

Q. Pretty far removed from the people, then? A. Yes, sir.

Colloquy

The Court: You wouldn't think so if you saw my mail.

Mr. Warriner: Sir?

The Court: You wouldn't think Courts were so far removed if you saw my mail.

Mr. Warriner: No.

The Circuit Court, the statute says, if Your Honor please, that the General Assembly elect the judges and the judges select the school trustee, the Electoral Board and the school trustee, and the Electoral Board select the School Board, and if you can get the people in that it is a long reach. [201] Of course we hope to change that.

The Court: Any other examination of the witness, gentlemen?

Thank you, sir.

(The witness stood aside.)

The Court: Call your next witness, gentlemen.

Mr. Warriner: We rest, if Your Honor please.

The Court: Do you wish to put on any evidence, Mr. Gray?

Mr. Gray: We have no witnesses, Your Honor.

The Court: Gentlemen, any rebuttal?

Mr. Marsh: We have no rebuttal evidence, Your Honor.

The Court: I will be glad to hear from you, gentlemen.

(Mr. Tucker made a closing statement to the Court.)

(Mr. Warriner made a closing statement to the Court.)

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(Mr. Gray made a closing statement to the Court.)

(Mr. Marsh made a closing statement to the Court.)

(A recess was taken at 2:55 to reconvene at 3:30.)

[202] The Court: Gentlemen, this matter is of such urgency that I think the Court ought to give its findings from the Bench so that everybody will know what the situation is, reserving the right to correct my grammatical errors and add citations that I deem appropriate.

I am going to try to make it as brief as I can, reserving the right to expand my findings and my conclusions of law. This will be brief so that if anybody is unhappy they can get it written up and go from here as quickly as they can. I will cooperate with anybody to that extent.

This matter comes before the Court today by virtue of an announced intention by the School Board of the City of Emporia who have been made additional parties to this suit to operate for the first time their own school system within the City of Emporia.

The Court adopts and takes judicial notice of its previous findings of fact and conclusions of law in this case and points out that this matter has been pending since 1965.

In June or July of 1968 the instant plaintiffs moved the Court for further relief. A hearing was had in connection therewith and in spite of the fact that everybody knew that the schools of Greensville County, which included the City of Emporia, that those were physically located in the City **[203]** of Emporia were operated by the then defendants who have to operate them in a unitary manner. At the behest of the original defendants the School Board

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of Greenville County and in view of their statement which was made as a matter of fact exactly one year from today, and I quote, "In view of the short period of time remaining before the opening of the schools reorganization of the system for 68-69 school year is virtually impossible administratively and would be disruptive and detrimental to the education program of the pupils." This Court extended the time for the filing of a plan and directed, as a matter of fact gave them until January 20. Even then that wasn't sufficient time, according to the then defendants. So they asked for an extension until January 31.

In short it was not until June of this year that a hearing was had on the proposed plan of operation for the schools. There had been one interim hearing in which it had been suggested that a certain testing program would be considered, and the Court heard evidence on that and gave leave for the then defendants to bring in further information.

In any event it wasn't until June that it was considered, some 10 months after the first report and some 12 or 13 months after, I believe, they were directed to file an appropriate plan or at least that they knew they would have [204] to file an appropriate plan.

Now, I mention this because the Court finds that the City School Board and the Council of the City of Emporia have known all during that period of time what was required under the law. The Court finds that they made no effort whatsoever to communicate their wishes or their desires to the County School Board of Greenville County, nor did they give the Superintendent of Schools, from the evi-

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dence before the Court, any assistance in attempting to formulate an appropriate plan.

The Court finds that after this Court's order of June 25, 1969, a meeting of the Council was held, according to the minutes contained in Plaintiffs' Exhibit 12, and the Mayor of the City of Emporia stated to the Council his opinion concerning the plan that had been approved by this Court. Without quoting him it certainly evidenced a disagreement with it.

The Court finds at that time a member of the School Board reported to Council the percentage of Negroes in each school for the first seven grades. It is apparent that therein was borne the idea that this School Board had never functioned as a School Board except for purposes of discussing with the School Board of Greenville County the salary of the [205] superintendent and selection, who had never functioned, had been created only because the law required that there be a School Board in the city, they then decided that they would operate a school.

Now, the Court finds that it has taken all this time to formulate a plan. The plan that is approved by this Court was a plan submitted by the Greenville School Board. That any disruption of same would not only enure to the detriment of the students, but would be a violation of the constitutional rights of the students of Greenville County. Education of the children must be protected.

The mere fact that there is a Board that, for all practical purposes, is a moot Board for the city and there is a county contiguous thereto, the process of desegregation ought not and cannot be thwarted by drawing a line between Emporia and Greenville County.

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It occurs to the Court that a political subdivision can be pierced to protect the pupils. It would seem appropriate, where necessary—and I don't think it is necessary under these facts at this time—that lines may be pierced to protect children's education.

The harm to the remaining students, if the Court did not issue an injunction, would be incalculable. And this [206] must be considered. See *Hobson v. Hansen* 269 F. Sup 401.

Under the New Kent decision this School Board had an obligation and a duty to take steps to see to it that a unitary system was entered into. All they have done up until now, and the Court is satisfied that while their motives may be pure, and it may be that they sincerely feel they can give a better education to the children of Emporia, they also have considered the racial balance which would be roughly 50-50 which would reduce the number of white students to, under the present plan, would attend the schools as presently being operated.

The Court finds that under *Brown v. Board of Education* 349 U.S. 294 that these defendants, all of them, have an obligation that they are going to abide by.

In short, gentlemen, I might as well say what I think it is. It is a plan to thwart the integration of schools. This Court is not going to sit idly by and permit it. I am going to look at any further action very, very carefully. I don't mind telling you that I would be much more impressed with the motives of these defendants had I found out they had been attempting to meet with the School Board of Greenville County to discuss the formation of a plan for the past year. I am not impressed when it doesn't

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happen until they have reported to [207] them the percentage of Negroes that will be in each school.

I find that if this were permitted—and not only is it not feasible and detrimental and a violation of the constitutional rights of the students, it really isn't anything. They don't have the first school teacher. They don't have a School Superintendent. They don't have the first building. They don't have the first book.

The injunction will issue.

Let there be no doubt that this injunction runs not only to the named defendants but every person within the jurisdiction of this Court that in any manner whatsoever attempts to interfere with the plans that are theretofore approved. The Court will be delighted to entertain motions for amendment of the plan at any time.

I think that covers it, gentlemen. If there are any questions or any doubt about what the Court is ruling please speak up. I will hold the motion for contempt in abeyance.

Yes, Mr. Kay.

Mr. Kay: If the Court please, I take it that the Court will set this down for hearing on the permanent injunction?

The Court: Yes, indeed.

Mr. Kay: And in the meantime I take it that the [208] Court will require a bond?

The Court: I am requiring a \$100 bond. That is what I am requiring.

Mr. Kay: You won't hear any—

The Court: What do you suggest it ought to be, Mr. Kay?

Colloquy

Mr. Kay: We are suggesting that considerable damage will result if the Court is in error and if this injunction stays in effect from the necessity of expending funds to transport students throughout the county which otherwise would not be necessary. And from that standpoint we think the bond should be substantially in excess of \$100.

The Court: All right, sir. Since I have no concrete evidence of that the bond will be \$100.

Mr. Kay: Now, sir, as to the date for a permanent or for a hearing on the permanent injunction. Does the Court want to set that now?

The Court: Well, I will be glad to do it. No, I don't have my next year's docket, Mr. Kay. Let me tell you. It is going to be some other Court that destroys this. Until I have a better one in front of me. I can't do it. So there is no rush for it.

This Court's injunction is going to enter today. [209] It is going to enter now as of 3:45.

Mr. Kay: Before we can determine what future course there should be perhaps we should get the record into shape that will be necessary to pursue that course. We would like to have a hearing at a reasonable prompt time. We realize that as a practical matter the Court's ruling today takes care of it.

The Court: It can be appealed in 15 minutes.

Mr. Kay: Yes, sir. But this is a temporary injunction and we want to get the record in proper form. We had very little notice.

The Court: Let the record show that I will cooperate with you so that you may appeal this, because it does go to the real issue.

Colloquy

Mr. Kay: Yes, sir. But if we would prepare to expand upon the record to some extent and follow the course—

The Court: All right, sir. What date do you suggest, Mr. Kay?

Mr. Kay: Well, I would hope some time in September.

The Court: No. We can't do it.

Mr. Kay: We would want the earliest date.

The Court: I doubt seriously if the Court—is [210] there any limitation on a temporary injunction, gentlemen?

Mr. Kay: There is on a restraining order.

Mr. Tucker: There is none on the injunction.

The Court: There is none. It will have to be after the first of the year for a hearing. I have got one in September that I believe you may be involved in, Mr. Kay. In any event starting in September I go into a series of cases which are rather lengthy. I start a 13-week's case in October.

Mr. Kay: We would like to pursue this in an orderly manner.

The Court: I want to give you all the time you want, but I don't see how I can do it. I must tell you I think you have had, you know, a long time to be heard. Well, Mr. Kay, I can give you a date in November, but I see here—I mean December. I have a case that if it is not finished I have it marked down here for going into the 40th day. Now, if it gets through then that is fine. We have a case here on December 15th that you are in which is supposed to take two days. Do you think that will take two days?

Colloquy

Mr. Kay: Yes, sir, if it is tried, which it appears it will be, it will take two days.

The Court: I can hear you December 18. How about that?

[211] Mr. Kay: If that is the earliest time then I would like to reserve that date and then we will take whatever action in the meantime that we are so advised.

The Court: All right, sir.

Mr. Kay: Keeping that date in mind.

The Court: Do you have a sketch of the injunction, Mr. Tucker?

Mr. Tucker: Well, the sketch that I passed up that Mr. Kay objected to.

The Court: I will meet with counsel in Chambers in reference to the form of it at the conclusion of this hearing.

Anything else, gentlemen?

Mr. Tucker: I would like to make one further motion. A matter of housekeeping, sir. That in the same suit, that is that Mr. Sam A. Owen should be substituted in the papers for Andrew G. Wright, Superintendent of Schools, and Billy B. Vincent should be substituted for Cary P. Flagg.

The Court: So ordered.

Mr. Warriner: If Your Honor please, a matter of housekeeping. I think that the papers might want to show George F. Lee is the Mayor and Robert F. Hutcherson and Gordon Harrison are additional councilmen not served.

[212] The Court: Thank you.

Mr. Gray: Could I inquire? Looking at the supplemental complaint there is nothing in the prayer of this complaint relating to contempt. Your Honor

Colloquy

said that the motion for contempt would be kept under advisement.

The Court: It was an oral motion, if nothing else.

Mr. Gray: What I want to inquire into is the scope of Your Honor's considerations, whether or not the County School Board of Greenville County is in any way subject to a inquiry as to contempt.

The Court: Yes. Yes, I will tell you now. They are. I am not so sure of informal conversations and so forth and so on, but that goes to anybody, Mr. Gray. I don't need counsel to—I am not critical, but I don't need Mr. Tucker or Mr. Marsh to suggest to the Court that anybody is under contempt if it comes to the Court's attention then I will handle it as I think I ought to.

Mr. Gray: Okay, sir.

Mr. Warriner: If Your Honor please, I don't want my clients to be before the Court and I take it my clients are free to continue what legal action they may be privileged to take.

[213] The Court: Absolutely. Just as long as it does not interfere with the operation of the plan.

Now, I am not going to tell you, certainly, how you ought to advise your clients. I just say that this plan may be amended at any time, that anybody can come in and show that there is a better way of doing it. I will be delighted to hear them. I am not going to take any steps now that is going to permit anybody to interfere with the operation of this plan, whether they are named defendants or strangers to the suit. If I have reason to believe they are interfering with it they are going to be heard, and if it is found then I am going to take the appropriate action.

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District Court's Findings of Fact and Conclusions of Law

[Filed on August 8, 1969]

This cause came on to be heard on the verified supplemental complaint and the plaintiffs' motion for an interlocutory injunction as prayed in the supplemental complaint; and having heard oral evidence and received exhibits in open court, the Court makes the following

FINDINGS OF FACT

This action, seeking the racial desegregation of the public school system of Greenville County, was commenced March 15, 1965.

On July 31, 1967, the Town of Emporia became a city of the second class known as the City of Emporia.

In recognition of its obligation to provide certain services and facilities including public schools for children within its boundaries, the said City by the Council thereof on April 10, 1968 entered into and signed an agreement with the surrounding County of Greenville acting through the Board of Supervisors thereof, whereby the County would continue to provide public schools to the citizens of the City of Emporia in the same manner as when the City was a town and to the same extent as provided to the citizens of the County, and the City would pay as billed its contractual share, ascertained at 34.26 percentum, of the local cost to the County. Said agreement provides for its continuing effectiveness for a period of four years and thereafter until notice will be given by either party to the other by December 1 of any year that said agreement would be terminated on July 1 of the second year following such notice. The contract provides for other contingencies in reference to termination.

District Court's Findings of Fact and Conclusions of Law

On June 17, 1969, this Court stated from the bench its findings of fact and conclusions of law regarding the plaintiffs' motion for further relief and indicated that an order would be entered requiring the County School Board of Greenville County to implement the plan for desegregation filed by the plaintiffs which proposed the use of two school buildings located near but outside the City limits for all children in primary and lower elementary grades living south of the Meherrin River, the use of a school building located within the City and one located near but outside the City limits for all children in primary and lower elementary grades living north of the Meherrin River, the assignment of all pupils in intermediate grades to Emporia Elementary School located within the City of Emporia, the assignment of all pupils in the junior high school grades to Wyatt High School located near but outside the City limits, and the assignment of all pupils in the senior high school grades to Greenville County High School located within the City limits. The only two schools in the system which white children have ever attended are within the City.

On June 24, 1969, Bruce Lee Townsend, an infant, etc., et al, residents of the City of Emporia, filed in the Circuit Court of the County of Greenville a petition (which on the same day was served on the respondents thereof, viz: City Council of City of Emporia, School Board of City of Emporia, Greenville County Board of Supervisors, and Greenville County School Board) seeking, *inter alia*, judicial dissolution of the above mentioned agreement of April 10, 1968, and an injunction preventing any pupils residing within the City from being assigned to schools not located within the City. Each of the respondents demurred to said petition on July 15, 1969.

On July 9, 1969, William H. Ligon, L. R. Brothers, Jr., T. Cato Tillar, Fred A. Morgan, Julian C. Watkins, S. G. Keedwell, M. L. Nicholson, Jr., and Robert F. Hutcheson,

District Court's Findings of Fact and Conclusions of Law

constituting the Council of the City of Emporia; George F. Lee, Mayor of the City; D. Dortch Warriner, City Attorney; and Robert K. McCord, City Manager, convened in a special meeting, the purpose of which was for "establishing a City School system."

Under date of July 10, the Mayor sought cooperation from the County Board of Supervisors, specifically the sale or lease of the school buildings located within the City.

At the July 14 meeting of the same City officials, the Mayor evidenced his dissatisfaction with the plan which this Court had ordered to be executed to accomplish school desegregation. The Council heard purported percentages of Negroes who would be in each school for the first seven grades under the plan approved by this Court, and there was evidenced a view that the plan was educationally unsound. The chairman of the City School Board advised the Council that approximately 500 County children could attend City schools if the City obtained the buildings wanted, i.e., the Emporia Elementary School and the Greenville County High School which white children of the County and City have traditionally attended. The Council unanimously decided to instruct the School Board of the City of Emporia to immediately take all steps to establish a school division for the City of Emporia.

At a special meeting held July 23, 1969, the Council adopted a resolution requesting the State Board of Education to authorize the creation of a school division for the City of Emporia.

The City School Board notified the County School Board that a separate school system for the City will be operated, that no City school children will attend the County system during the year 1969-70 and thereafter, and that the City would no longer pay a share of the cost of operating the County schools. The notification solicited the cooperation of the County School Board in making this transition which

District Court's Findings of Fact and Conclusions of Law

was characterized as being "for the benefit of the entire community."

The City School Board has caused to be circulated and posted a notice dated July 31, 1969, requiring all parents of school age children residing in the City to register such children during the week of August 4-8 and inviting applications from out-of-city students who desire to attend Emporia City schools on a tuition, no transportation basis.

The City School Board's proposed operation of the schools would afford those students residing in the County the opportunity to attend a City school upon payment of certain tuition fees.

Certain members of the County School Board and members of the Board of Supervisors had knowledge of the foregoing events as and when they occurred and have met with members or representatives of the City Council and of the City School Board and discussed the plans of the City to withdraw from the County school system.

The Court further finds that a failure of this Court to enjoin the defendants would result in incalculable harm to those students residing in the County and would be disruptive to the effectiveness of the Court's previous order.

The Court further finds that the members of the School Board of Emporia have not functioned as such except for the purpose of consulting with the County Board in the selection of a superintendent of schools. They never acted in any manner for purposes of offering their assistance to the County Board in reference to a school plan to be submitted to this Court.

On the basis of the foregoing, the Court makes the following

CONCLUSIONS OF LAW

1. As a successor to the County School Board with respect to the duty to educate children of school age residing

District Court's Findings of Fact and Conclusions of Law

in the City of Emporia, the City School Board would be and is bound by this Court's order requiring the County School Board to disestablish racial segregation in the public school system which it controlled and operated both when this suit was commenced and when said order was entered and to do so in accordance with the plan approved by this Court.

2. As persons in participation with the County School Board with respect to the cost of the school system, and they having received notice of this Court's said order, the Council of the City of Emporia, the members thereof, the Mayor of the City, the School Board of the City of Emporia, the members thereof, the County Board of Supervisors of Greensville County and the members thereof were and are bound by this Court's said order.

3. The establishment and operation of a separate public school system by the City of Emporia and the consequent withdrawal of children residing in that City from the public school system of Greensville County would be an impermissible interference with and frustration of this Court's said order.

4. The Council of the City of Emporia may not withhold its appropriate share of financial support for the operation of public schools by the County School Board of Greensville County when such would defeat or impair, the effectuation of the constitutional rights of the plaintiffs in the manner which this Court has directed.

Dated: 8-8-69

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

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Order of District Court

[Entered and Filed on August 8, 1969]

For the reasons assigned in the Court's Findings of Fact and the Conclusions of Law, and deeming it proper so to do, it is ADJUDGED, ORDERED and DECREED that the School Board of the City of Emporia and the members thereof, viz: E. V. Lankford, Julian P. Mitchell, P. S. Taylor and G. B. Ligon, and their successors, and the officers, agents, servants, employees and attorneys of said Board, as well as George F. Lee, as Mayor of the City of Emporia, and his successors, and the Council of the City of Emporia and the members thereof, viz: William H. Ligon, L. R. Brothers, Jr., T. Cato Tillar, Fred A. Morgan, Julian C. Watkins, S. G. Keedwell, M. L. Nicholson, Jr., and Robert F. Hutcheson, and their successors, and the officers, agents, servants, employees and attorneys of said Council, be, and they hereby are, enjoined and restrained from any action which would interfere in any manner whatsoever with the implementation of the Court's order heretofore entered in reference to the operation of public schools for the student population of Greensville County and the City of Emporia.

This order shall be effective upon the plaintiffs' giving security in the sum of \$100.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined; and shall remain in full force and effect for a period of 140 days unless sooner modified, enlarged or dissolved.

Let the United States Marshal serve copies of this order upon each of the named defendants.

Dated: August 8, 1969

3:45 P.M.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

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Answer of Defendants to Supplemental Complaint

Filed on August 15, 1969

1. The complaint fails to state a claim against these defendants upon which relief can be granted.

2. The Court lacks jurisdiction over the subject matter of the claims stated in the complaint.

3. Defendants admit the allegations contained in paragraph 2 of the complaint, except that they deny that the City of Emporia is located entirely within the boundaries of the County of Greenville. Though the City is surrounded by said County, it is independent of and not included in said County.

4. Defendants admit the allegations of paragraph 3 of the complaint.

5. Defendants admit the allegations of the last two sentences of paragraph 4 of the complaint. With respect to the first sentence of said paragraph, Defendants admit that during and prior to the 1968-69 school session, children of public school age residing in the City of Emporia have attended the public school system operated by the School Board of Greenville County and that, since its incorporation in 1967, the City has contributed to the general fund of said County a share of the costs of all the services provided by the County to the City, including schools. It denies the allegations of the first sentence of paragraph 4 of the complaint to the extent such allegations are inconsistent with the preceding sentence of this answer.

6. In response to the allegations of paragraphs 5 and 6 of the complaint, Defendants state that the orders and rulings of the Court speak for themselves.

Answer of Defendants to Supplemental Complaint

7. Defendants admit the allegations of paragraph 7 of the complaint.

8. Defendants deny the allegations of paragraph 8 of the complaint.

/s/ JOHN F. KAY, JR.

Of Counsel for Council of the City
of Emporia and the members there-
of, and the School Board of the City
of Emporia and the members
thereof

D. Dortch Warriner
Warriner and Outten
332 South Main Street
Emporia, Virginia

John F. Kay, Jr.
Mays, Valentine, Davenport & Moore
1200 Ross Building
Richmond, Virginia 23219

Defendants' Exhibit E-I

**Excerpts From Minutes Of State Board Of Education
Meeting Held August 19-20, 1969**

**"REQUEST FOR THE CREATION OF A NEW
SCHOOL DIVISION FOR EMPORIA CITY**

"Dr. Wilkerson reported that resolutions had been received from the school board and city council of the City of Emporia requesting the establishment of a school division consisting of the city. The Greensville County school board has passed and submitted a resolution opposing the dissolution of the present school division consisting of the county and the city

"Mr. Lankford presented the following statement:

"After a thorough discussion, the Board upon motion duly made and adopted, tabled the request of the City of Emporia in light of matters pending in the federal court."

I certify that the above is a true copy of excerpts from the minutes of the State Board of Education meeting held on August 19-20, 1969.

/s/ WOODROW W. WILKERSON
Woodrow W. Wilkerson, Secretary
State Board of Education

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**Minutes of Meeting of School Board of City of
Emporia December 3, 1969 and Attachments Thereto**
[Defendants' Exhibit E-G to District Court Proceedings
of December 18, 1969]

The School Board, City of Emporia, met on the above date at 4 P.M. in the City Manager's (Clerk's) Office of the Municipal Building with Chairman E. V. Lankford, Jr. presiding. The following members were present:

Dr. P. C. Taylor
Mr. Julian Mitchell
Mr. G. B. Ligon

Also present was Mr. Robert K. McCord, Clerk.

The Chairman reported that in accordance with the School Board's actions of November 19, 1969, Dr. H. I. Willet had been instructed to prepare and submit a proposed estimated budget for Emporia City School Operation for the school year 1970-71. The Chairman further advised that Dr. Willett felt that it would be inappropriate at this time to develop the actual school curricula. Therefore, this portion was eliminated from his work.

Mr. Lankford then submitted the estimated proposed school budget for the City of Emporia for the school year 1970-71. Said budget is attached hereto as Exhibit A.

The Board carefully examined the budget as submitted together with the budget message presented, and on motion by Mr. Mitchell which was seconded by Dr. Taylor, the Board adopted the estimated proposed school budget.

Mr. Lankford advised that he would appreciate the Board Members' attendance at an informal meeting with the City Council December 4 in order to inform Council in detail on the proposed estimated school budget. He further ad-

Minutes of School Board of Emporia of December 3, 1969

vised that final action on the estimated budget would be dependent on City Council at their regular meeting December 5, 1969.

There being no further business, the meeting adjourned.

E. V. LANKFORD, JR.
Chairman

ROBERT K. McCORD
Clerk

This is to certify the above is a true copy of the minutes of the Emporia City School Board Meeting held on the above date.

ROBERT K. McCORD
Clerk

Minutes of School Board of Emporia of December 3, 1969

EXHIBIT A

Minutes 12/3/69

City of Emporia

ESTIMATE OF PROPOSED SCHOOL BUDGET

1970-1971

[Emblem] Virginia Commonwealth University

Mr. E. V. Lankford

Chairman of the Emporia School Board
Emporia, Virginia

Dear Mr. Lankford:

I am submitting herewith a proposed school budget for the City of Emporia for the session 1970-1971, which has, hopefully, been kept within the general guidelines that were set up. In our discussion at the proposed joint meeting of the school board and the City Council, we can go into more detail concerning the priority that should be assigned certain specific items.

The cost of teacher salaries in the proposed budget is in harmony with the average of the \$7500 that you had proposed. However, this item causes me some concern since it will not permit an increase in the teacher salary schedule beyond the anticipated \$300 increase in the teacher salary schedule for 1970-1971. A further increase in the teacher salary schedule merits careful consideration and may well deserve a higher priority than some items now included in the proposed budget. I will be glad to work out some proposals for consideration if you so desire.

Minutes of School Board of Emporia of December 3, 1969

I wish to express my appreciation for your cooperation and help in developing this proposed budget which I trust will supply the necessary information for a full discussion with the school board, the City Council, and the City Manager. I will, of course, be happy to assist with any revisions that may be proposed.

Very sincerely yours,

/s/ H. I. WILLETT

H. I. Willett

November 28, 1969

HIW:ca

Minutes of School Board of Emporia of December 3, 1969

City of Emporia

ESTIMATE OF PROPOSED SCHOOL BUDGET
1970-1971

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BUDGET MESSAGE**Some Basic Factors and Assumptions**

- I. The *enrollment projections* are based on enrollment figures supplied by Greenville County Administration as of September 30, 1969 for the City of Emporia. These grade by grade enrollment figures were moved up one grade and increased by approximately 10 percent on the expectation that some pupils now attending other schools would return to a city-operated school system.

The Averaged Daily Attendance figure used is based on 92 percent attendance, which was the percentage of attendance figure for Greenville County for the session 1968-69. Otherwise the enrollment figures appear reasonably stable for the next several years, except as the school system would increase its holding power as the result of an improved educational program that is more relevant to the needs of its pupils in today's world.

- II. The *estimates of revenue* are based in part upon the relationship of pupils enrolled in school from the City of Emporia to the total enrollment of pupils in the Greenville County school system. The basic State appropriation was derived from applying the State formula and using the 1968 true values as prepared by the State Tax Commission. The \$300 increase in the State teacher salary schedule for 1969-70 was worked into the

Minutes of School Board of Emporia of December 3, 1969

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budget plus an assumption that the General Assembly would approve another \$300 increase in the minimum basic teacher salary schedule for 1970-71. There was also an assumption that the City would provide for a kindergarten program and that some bus transportation would be essential from a practical viewpoint and that otherwise some pupils would probably have to travel a distance to school that would place them beyond the requirements to enforce a compulsory school law.

A very important quality item for children from low income families is the provision for adequate health services. Consequently, funds have been included for the development of a health program including the part-time services of a physician and two nurses. A part of this cost can be supplied through Federal funds since the service of nurses in particular would also be needed for special Federal projects. The health service could possibly be tied in closely with a city-wide health program.

Estimates of Federal funds are at best a guess at this time; however, the same pupil ratio of city pupils to county pupils from poverty target areas was assumed. The same availability of Federal appropriations was also assumed.

III. There are several important factors that will affect the cost of operating a separate and independent school system for the City of Emporia.

1. It is more costly to operate a quality education

Minutes of School Board of Emporia of December 3, 1969

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program for a system with less than 1500 pupils than in a considerably larger school system.

2. Since Emporia City will have more wealth per child in terms of true real estate values than Greensville County, it can expect to receive relatively less money from the State under the category of Supplemental State Share.
3. The stated reason for desiring to operate a separate and independent school system for the City of Emporia is to provide a better quality education program; consequently the cost can be expected to rise.
4. This budget is being proposed for 1970-71 which is two years later than the last year for which we have comparable figures for the per-pupil cost of operation. Consequently, costs can be expected to rise in other school divisions as the result of improved programs, inflation, and higher salaries. The following table shows the increase in per-pupil cost of operation for 1968-69 over 1967-68 in several school systems of the State:

Minutes of School Board of Emporia of December 3, 1969

	1967-68 p.p.c.	1968-69 p.p.c.	Increase
Abingdon	\$436	\$528	\$ 92
Colonial Beach	517	570	53
West Point	516	526	10
Buena Vista	463	557	94
Lexington	571	607	36
Falls Church	838	982	144
Greensville Co.	452	505	53
State of Virginia			
Median	458	511	53

If the same yearly rate of increase were to occur, the per-pupil cost of operation in 1970-71 would be

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\$611 in Greensville County and \$617 for the State of Virginia. In 1965-66, the per-pupil cost of operations in Greensville County was \$299, compared with the \$505 per-pupil cost in 1968-69. This represents an average yearly increase of approximately \$68 for the three-year period in per-pupil cost of operation.

Specific Budgetary Conditions that Relate to Quality

- I. The provision for a *kindergarten program* represents one of the most important quality items in the budget. The United States has been behind European nations in providing adequate early childhood education, and Virginia has lagged behind much of the Nation. Now that the State of Virginia supports a kindergarten program on the same basis that it supports the rest of the elemen-

Minutes of School Board of Emporia of December 3, 1969

tary school, this important foundation of education should expand rapidly.

The program is needed for pupils from homes where the child is highly motivated and is needed even more urgently for pupils from the disadvantaged segment of society. With the wide range in abilities, interests, and motivation now found in most schools, it becomes increasingly important to reach the child at any early age to compensate for the neutral and negative factors to be found in too many homes. American educators studying the Soviet system of education report that the most important advantage to be found in the Soviet Union is in the area of Early Childhood Education.

Recent experiments and psychological studies em-

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phasize the importance of Early Childhood Education as the foundation for all later education. For example, Professor Bloom of the Chicago University reports on his studies which indicate that approximately 50 percent of a child's capacity to learn develops by the time he is four years of age, and 80 percent by the time he is eight years of age.

- II. The per-pupil cost of education is closely related to the teacher-pupil ratio and the services that are provided. The *quality of education* is also related to these same factors. The size of class is important in meeting the needs of disadvantaged pupils and some small classes will be essential for the most gifted college bound pupils, especially in a small

Minutes of School Board of Emporia of December 3, 1969

high school if the pupils are to have a variety of courses to prepare them for continuing education at institutions of higher learning. The same principle also applies to vocational training of those pupils for whom high school education is terminal, at times before graduation.

Consequently, quality education in the City of Emporia will require some very small classes and a generally low pupil-teacher ratio which is fairly typical of small school systems as illustrated in the following table which gives the pupil-teacher ratio for certain school systems for the session 1968-69:

<i>School Division</i>	<i>Enrollment</i>	<i>Elementary pupil-teacher ratio</i>	<i>High School pupil-teacher ratio</i>
Abingdon	1080	22.5	17.4
Buena Vista	1530	26.5	17
Colonial Beach	500	28	14.9
Highland Co.	594	19.8	17.4
Lexington	1229	22	20
West Point	859	23.5	15.2
Greensville Co.	4261	24.7	21.6
State of Virginia	—	25.59	19.36

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This budget proposal provides for a favorable pupil-teacher ratio, but one that is comparable with other smaller school systems.

Specific provision is made for special education which is most important for a quality program.

Minutes of School Board of Emporia of December 3, 1969

- III. A small school system with a capable, intelligent and innovative staff under dynamic leadership has a good opportunity to achieve excellence in part because its size presents favorable conditions for experimentation and research that will more quickly identify and implement desirable changes.

The administrative and supervisory positions included in this proposed budget are designed to create an environment and atmosphere of expectation that will stimulate the staff, pupils, and community to become involved in developing and maintaining programs of education that have meaning for both pupils and adults.

The School Board is committed to demonstrating that a small city school system can have quality education at a cost that is within the means of an intelligent, involved and informed citizenry. The approximate 50-50 racial mix in the proposed city school system presents a challenge and opportunity

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that can have significant implications not only for Emporia and Greensville County, but also for the State.

The provision for expanded adult education, after school pupil programs, health and attendance services, the use of more teacher aides, pupil transportation, a low teacher-pupil ratio, guidance services, expanded high school programs, and kindergarten represent some tangible evidence that the School Board, the City Council, and the citizens of Emporia are committed to the development of

Minutes of School Board of Emporia of December 3, 1969

quality education programs to serve all the pupils of the city.

Some Factors Related to Quality

There are certain quality features in an educational program that will not necessarily be reflected specifically in budgetary figures. The *plan of school organization* can have an important impact on the quality of the program. *Non-graded primary organizations* are no more costly and yet they offer some encouraging possibilities in dealing with children in accordance with their varying interests, abilities, and rate of development.

It is no longer realistic to expect a sixth-grade teacher to keep on the cutting edge of what is happening in all the subject areas that she is expected to teach in a self-contained classroom. Consequently, *team teaching*, where a group of teachers work together in better using the deeper knowledge of individual teachers in specific subjects, affords much promise. The group planning stimulates the teacher, and insures the pupils of more exciting presenta-

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tions and discussions that contribute to a more effective learning environment.

Expanded work experience with related course work in high schools along with *short training courses* permit entry into skilled and semi-skilled jobs that hold some pupils until graduation and permit other pupils who may not graduate to get jobs, rather than roam the streets aimlessly.

More emphasis on *independent study* develops the pupil's ability to think and work independently. It also presents

Minutes of School Board of Emporia of December 3, 1969

a plan for better meeting the pupil's needs in a small high school where classes tend to be very small in specific areas.

Community volunteers offer a rich resource of talent to aid the teacher in individualizing instruction and keeping the materials and techniques relevant to the best that we know.

Small school systems need the *same general services* and should perform the *same general functions* and offer the *same opportunities* that are found in larger systems. Therefore, it becomes even more important to select personnel with the training and experience to render these services. This means that one administrator or supervisor may have to perform functions in several areas. Consequently, the administrative and supervisory staff must be selected to be a part of the team that can render total services and perform all the functions that are essential in a school system.

A good in-service program for all employees will cost some money but its success relates more to morale and

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enthusiasms of staff members than to the amount of money spent. This is another reason that the school board places great value upon the quality of leadership. Federal funds are available for in-service training and many other purposes, and universities can be very helpful in supplying leadership, etc. to a small school system that necessarily will have some staff limitations.

The school board proposes to utilize such services in discharging its responsibility in providing quality education. The Board will place emphasis upon setting up priorities

Minutes of School Board of Emporia of December 3, 1969

in program development that relate to the most urgent needs of pupils in this community. It will give close supervision to insure wise use of all dollars made available for education and it will seek the quality of administrative leadership that can implement its goals and purposes.

It should be pointed out that this budget proposal includes no increase in the teacher salary schedule beyond the anticipated \$300 increase in the State minimum salary schedule. The Greenville County salary schedule for 1969-70 ranges from \$6100 to \$7700, with \$100 annual increments for teachers with a Bachelor's degree. Among the 139 school systems in the State, 72 have a beginning salary of \$6100 or less, while 27 have a maximum salary of \$7700 or less for the Bachelor's degree.

There are 72 instructional jobs in the proposed budget on the teacher salary schedule. Therefore, each \$100 increase would cost \$7200. The size of the annual increments is also entirely too small to remain competitive in the State. If we are to attract and hold top level teachers, some early consideration must be given to the teacher salary schedule.

Minutes of School Board of Emporia of December 3, 1969

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City of Emporia

ESTIMATE OF PROPOSED SCHOOL BUDGET

1970-1971

REVENUE

STATE FUNDS

Basic Appropriation	\$287,418
Driver Education	650
Foster Home Children	720
Free Textbooks	2,500
Guidance Counselors	2,400
In-Service Training	700
Local Supervision	2,500
Pupil Transportation	7,200
Special Education	2,500
Summer School	500
Supervising Principals	1,000
Teacher Sick Leave	1,000
Educational Television	1,200
Vocational Education	12,000

Total State Funds

\$322,288

FEDERAL FUNDS

Adult Basic Education	4,400
Elementary & Secondary Act	120,000
N.D.E.A.	1,500
School Food Program	8,500

Total Federal Funds

\$134,400

Minutes of School Board of Emporia of December 3, 1969

REVENUE (Continued)

OTHER FUNDS

Donations, Tuition, Rebates, etc.	\$ 4,200
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TOTAL CITY FUNDS	\$426,212
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TOTAL REVENUE	\$887,100
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DISBURSEMENTS

ADMINISTRATION

Board Members	\$ 2,400
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Superintendent	15,000
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Secretaries	8,000
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Audit Expense	500
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Postage, Telephone, etc.	1,200
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Travel	1,000
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Contractual Services	1,000
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Office Supplies	600
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Census, Surveys, etc.	500
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Total Administration	\$ 30,200
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INSTRUCTION

Compensation of Teachers (68 x 7500)	510,000
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Two Librarians	16,000
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Two Guidance Counselors	17,000
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One Elementary Principal	11,000
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One High School Principal	12,000
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One Assistant Principal	10,000
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One Supervisor	10,000
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Substitute Teachers	3,000
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Total Instruction	\$589,000
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*Minutes of School Board of Emporia of December 3, 1969***DISBURSEMENTS (Continued)****OTHER INSTRUCTIONAL COSTS**

Clerical Services	\$ 12,000	
Instructional Aides	25,000	
Travel	1,500	
Educational Television	2,500	
Other Instructional Costs	5,000	
Library Books	10,000	
Free Textbooks	10,800	
In-Service Training	1,500	
	<hr/>	
Total Other Instructional Costs		\$ 68,300
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ATTENDANCE AND HEALTH SERVICES

Visiting Teachers	\$ 8,000	
Nurses	12,000	
Physician (part time)	10,000	
Medical Supplies	1,000	
	<hr/>	
Total Attendance & Health		\$ 31,000

PUPIL TRANSPORTATION

Transportation to School	12,000	
Miscellaneous	2,000	
	<hr/>	
Total Pupil Transportation		\$ 14,000

SCHOOL FOOD SERVICES

School Lunch and Milk Fund	10,000	
	<hr/>	
Total School Food Services		\$ 10,000

Minutes of School Board of Emporia of December 3, 1969

DISBURSEMENTS (Continued)

OPERATION OF SCHOOL PLANT

Compensation of Custodial Staff	\$ 18,000
Electrical Services	4,500
Telephone Services	800
Water Services	600
Custodial Supplies	3,000
Fuel	7,500
Other Expense	600

Total Operation of Plant

\$ 35,000

MAINTENANCE OF SCHOOL PLANT

Compensation of Maintenance Personnel	5,000
Repair & Replacement of Equipment	5,000
Contractual Services	300
Building Materials, etc.	3,100
Other Expense	100

Total Maintenance School Plant

\$ 13,500

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FIXED CHARGES

Fire Insurance	\$ 2,000
Workman's Compensation Insurance	1,000
Employer's Contributions	5,500

Total Fixed Charges

\$ 8,500

Total Cost of Operation—Regular Day Schools

\$779,500

*Minutes of School Board of Emporia of December 3, 1969***DISBURSEMENTS (Continued)****SUMMER SCHOOL**

Compensation Instructional
Personnel

\$ 3,600

Total Summer School

\$ 3,600

ADULT EDUCATION

Basic Adult Education

5,000

General Adult Education

1,000

Total Adult Education

\$ 6,000

CAPITAL OUTLAY

Furniture and Equipment

6,000

School Buses

12,000

Total Capital Outlay

\$ 18,000

OTHER EDUCATIONAL PROGRAMS

Clerical Services

1,000

Aides

15,000

Custodial Services

2,000

Instructional Personnel

25,000

Equipment & Supplies

4,000

Books and Supplies

3,000

Other Costs

10,000

Total Other Educational
Programs

\$ 60,000

TOTAL DISBURSEMENTS

\$887,100

Minutes of School Board of Emporia of December 3, 1969

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REVENUE

BUDGET SUMMARY

STATE FUNDS

Basic Appropriations	\$287,418
Other State Funds	34,870

Total State Funds	\$322,288
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FEDERAL FUNDS

134,400

OTHER FUNDS (LOCAL)

4,200

CITY FUNDS

426,212

Total Revenue	\$887,100
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DISBURSEMENTS

Percentage

Administration	30,200	3.8
Instruction	589,000	74.2
Other Instructional Costs	68,300	8.8
Attendance & Health Services	31,000	
Pupil Transportation	14,000	5.8
School Food Services	10,000	
Operation of Plant	35,000	4.5
Maintenance School Plant	13,500	1.8
Fixed Charges	8,500	1.1

Total Cost of Operation Regular Day Schools	779,500	100
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Other Educational Programs	60,000	
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Total Disbursements	\$887,100	
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Minutes of School Board of Emporia of December 3, 1969

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ESTIMATED PUPIL ENROLLMENT

Grade	No. of Pupils	Teachers
Kindergarten	110	5
1	120	5
2	120	5
3	90	4
4	120	5
5	96	4
6	100	4
7	115	5
Total Elementary	871	37
8	110)	
9	100)	
10	90)	28
11	100)	
12	70)	
Spec. Ed.	26	3
Total High School	496	31
Totals	1367	68

A.D.A. 801—Based on attendance; average class size 23.5; State Teacher Units—27

Based on Pupil-Teacher Ratio—17
Including librarian & counselor—15.67

A.D.A. 456—Based on attendance; State Teacher Units—20
A.D.A. 1257—Teacher Units—47

Estimates applied to State Distribution Formula

Salaries	ADA	ADA x 115	Minimum Program	60—1968 Values	State Share	Supplemental State Share
312,879	1257	144,555	457,434	170,016	187,727	99,691

Minutes of School Board of Emporia of December 3, 1969

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City of Emporia

DATA FROM VIRGINIA TAX COMMISSION

1968—Estimated True Value

Real Estate	\$25,565,000	
Public Service Corporation	2,771,000	
	<hr/>	
Total		\$28,336,000

1968—Assessed Value

Real Estate	\$ 3,783,590	
Tangible Personal Property	1,682,565	
Machine & Tool	431,171	
Merchants Capital	571,361	
Public Service Corporation	944,203	
	<hr/>	
Total		\$ 7,412,890

Some Comparative Data

Greensville County 1968 True Values—33.6 in Emporia City	
Greensville County, Sept. 30, 1969 Enrollment—29.9 in Emporia City	
Greensville County 1967—1968 Per Pupil Cost of Operation—\$452	
Greensville County 1968—1969	505
Abingdon	528
Colonial Beach	570
Poquoson	484
West Point	526
Highland County	592
Lexington	607
Fairfax City	671
Falls Church	982
Buena Vista	557

Median per-pupil cost 1968-1969—Towns 503, Counties 503

Cities 575—State 511. Estimate Emporia 1970-1971, 620.

Defendants' Exhibit E-F**Minutes of Meeting of School Board of City of Emporia,
December 10, 1969**

The School Board of the City of Emporia met on the above date at 5 P.M. in the Municipal Building with Chairman E. V. Lankford, Jr. presiding. The following members were present:

Dr. P. C. Taylor
Mr. Julian P. Mitchell
Mr. G. B. Ligon

Also present were City Attorney D. Dortch Warriner and Robert K. McCord, Clerk.

Mr. Lankford reported to the School Board that the proposed estimated school budget for City School Operation for the school year 1970-71 had been unanimously adopted by the City Council at their regular meeting December 5, 1969.

Mr. Lankford introduced the following Resolution, which after considerable discussion by the Board, was unanimously adopted:

If permitted by the United States District Court to operate its own school system, the School Board of the City of Emporia will do so according to the following plan:

1. Assignment of pupils and faculty shall be made on a completely racially integrated basis resulting in a racially unitary system. All pupils of the same grade in the system shall be assigned to the same school, with the possible exception of those pupils assigned to a special education program which program will

Defendants' Exhibit E-F

be conducted on a racially integrated basis. It is contemplated that all grades, kindergarten through the sixth grade, shall be located and conducted in one building (the former Emporia Elementary School to be renamed R. R. Moton Elementary School) and all grades, seventh through twelfth, shall be located and conducted in one building (the former Greenville County High School to be renamed Emporia High School).

2. The schools will sponsor and support a full range of extra-curricular activities and all activities conducted by or in the public school system will be on a racially integrated basis.

3. Any bus transportation that is provided will be on a racially integrated basis.

4. No students will be accepted from other school divisions or districts until approval is first obtained from the United States District Court.

/s/ E. V. LANKFORD, JR.
Chairman

/s/ ROBERT K. McCORD
Clerk

Proceedings of December 18, 1969**[11]**

HEARING BEFORE
THE HONORABLE ROBERT R. MERHIGE, JR.,
UNITED STATES DISTRICT JUDGE,
FOR THE EASTERN DISTRICT OF VIRGINIA,
AT RICHMOND, VIRGINIA,
18 DECEMBER 1969.

[12] . . .

EDWARD G. LANKFORD, having been called as a witness was duly sworn by the Clerk and testified on his oath, as follows:

Direct Examination by Mr. Warriner:

Q. What is your name, please? A. My name is Edward G. Lankford, Junior.

Q. What is your age? A. 45.

Q. And your occupation? A. I am in the general insurance business.

Q. And your place of residence? A. 505 Laurel Street, Emporia, Virginia.

Q. With respect to the School Board of the City of Emporia, what office, if any, do you hold? A. I am a member of the School Board and I was elected as its Chairman.

Q. When was this City School Board constituted? A. Shortly following the transition of Emporia to a City in July, I received a call from the Mayor and in late August, while I was on vacation.

[13] Q. What year? A. August of 1967.

Q. When did the City undergo a transition from a town to a City? A. July 31, 1967, I believe.

Edward G. Lankford—for Defendants—Direct

Q. After the School Board was—for the City of Emporia, was constituted in August of 1967, what activity, if any, did the School Board enter into? A. We found ourselves in a rather difficult situation. Here we were a four-man school board, with no previous school administrative experience. So, we had to seek advice from whatever direction we could find it. We realized, of course, that these children from the City had already entered into the County School system with no formal agreement of any kind. We met and discussed several things. I met, personally, with the Superintendent of Schools. I met with the Chairman of the School Board informally and he and I discussed it. It seemed to me, we had three alternatives; we could operate an independent system, completely separate from the County of Greensville; we could try to establish a jointly operated system, whereby the school operation would be vested in a single school board; with equal, not equal, but proportionate representation [14] on the part of the County and the City systems and the third alternative was to contract with the County to educate the City pupils.

Q. Did you seek to effectuate any of these alternatives? A. I believe, personally, ultimately, I felt an independent operation would be the best way, but practically speaking, at that time, knowing the attitude of the County government, we were more inclined; after my discussions with Mr. Slate, who is the Chairman of the School Board, and Mr. Wright, who is or was, Superintendent at that time, were more,—I was personally, more inclined to go along with a joint operation.

Q. Did you have the support of your School Board in this? A. Yes, sir.

Edward G. Lankford—for Defendants—Direct

Q. Did you have the support of the County School Board in this? A. I can't say officials. Those officials—with those I talked to, I believe that they were agreeable to a jointly operated system.

Q. Were you able to obtain a jointly operated system? A. No, sir.

Q. Why not? A. A jointly operated system, according to the State law, has to be approved by both school boards and [15] the City-Council and the Board of Supervisors. On this 17th of November, I believe, 1967, the Board of Supervisors adopted a resolution, one paragraph of which firmly stated that they would not agree to any joint operation of schools.

Q. Mr. Lankford, I show you a photostatic copy of a piece of paper and I ask you if you recognize it? A. Yes, sir.

Q. What is the date on it? A. The 27th day of November 1967.

Q. What does it purport to be? A. It is a resolution on the operation of schools from that special meeting of the Board of Supervisors of the Greenville County?

Q. Did you receive a copy of this resolution in the course of your duties as Chairman of the City School Board? A. Yes, sir.

Q. Would you read paragraph number one of that resolution into the record? A. "The County of Greenville will not grant approval of any joint operation of the County and City schools systems."

Q. If Your Honor Please, I present this in evidence. I don't know what number, whether you continue the numbers from the last time or not.

The Court: Any objections?

Edward G. Lankford—for Defendants—Direct

[16] Mr. Tucker: No objections.

The Court: It is admitted into evidence.

(Clerk marked Defendant's Exhibit E-A)

Q. Now, following this notice, did you seek legal advice in an attempt to persist in this effort to obtain a joint school system, or an independent school system? A. Yes, sir, of course, the City had at its—at that time, as its attorney, Mr. C. D. Hendrick and I went to Mr. Hendrick and we discussed these problems. Mr. Hendrick had, I believe, at that time, already indicated to City Council that he preferred not to represent the City in any litigation between the City and County over this transition. Which, I assumed, meant that he—well, he told me—

Mr. Marsh: Your Honor, this is hearsay. It is alright, but now he has assumed what Mr. Hendrick had in mind. I think he is going too far.

The Court: You had an objection?

Mr. Marsh: Yes, sir, objection to the question and the answer.

The Court: As being hearsay, or, going too far?

Mr. Marsh: Your Honor, on hearsay, all on the assumption of what Mr. Hendrick had had in mind.

The Court: Objection sustained.

[17] Q. Were you able to obtain representation on the part of the School Board by Mr. Hendrick? A. No, sir.

Q. Did you obtain representation of the School Board by any other counsel? A. Yes.

Q. Who? A. The City retained Mr. Harold Townsend as counsel.

Edward G. Lankford—for Defendants—Direct

Q. Did you, in the course of representation by Mr. Townsend, have any conferences or other conferences or correspondence, with him? A. Yes, sir.

Q. What instructions did you give Mr. Townsend, with respect to the type of school operation that you wanted him to obtain for you? A. The instructions, as I recall, were more or less guided by this resolution that the County had passed. I felt that the operation of the joint system had been stymied at that time. The only other alternative that we could go to would be a contractual arrangement and we felt that a—if we could negotiate a contract with the County for the continued operation, or continued education of the City pupils, that we could possibly buy a little time. We attempted, or I asked him in the agreement, to come up with maybe a one-year contract, with a [18] six month's termination clause. So that at the end of that time, we could either renegotiate a contract, the completion of the political make-up of the Board of Supervisors may have changed by that time. We could, we would have a little bit more free hand.

Q. Did your Council submit various and sundry proposals in an attempt to effectuate either a joint School Board or a contract that would replace it by you some time so that you could set up your own system? A. Yes, sir.

Q. I show you a sheet of—consisting of 1, 2, 3, 4, 5—6 different groups of papers stapled together and ask you to—if you recognize them? A. Yes, sir.

Q. What are they? A. These are at least six different contracts that were drawn up, either by our attorney, Mr. Townsend, or by the County's attorney, Mr. Fitzgerald and I say at least six. There may have been more, but this is all I have in my file.

Edward G. Lankford—for Defendants—Direct

Q. I ask that these be accepted into evidence as one exhibit.

The Court: All right.

Mr. Tucker: We object to the introduction of the papers in evidence. They are totally [19] immaterial to what—

The Court: Let me ask you—the admissibility of evidence depends upon the purpose. What is the purpose?

Mr. Warriner: The purpose is to show, if Your Honor please, these people did not suddenly, in June 1969, become interested and involved in their school system.

The Court: It is not really necessary if that is your purpose, to plug the record with papers. The witness testified that—that is what he is testifying to now.

Mr. Warriner: If that is acceptable, Your Honor, I withdraw those.

The Court: Objection sustained.

Q. Now, in the Spring of let's say, I'll go to March of 1968, had you, at that time, been able to effect a joint school system, a separate school system, or a contract system?
A. No, sir.

Q. Did you, in March of 1968, receive any notice from the County, that, with respect to the operation of the schools? A. Yes, sir, we received a copy of a resolution they passed.

[20] Q. I show you a paper writing and ask you if you recognize it? A. Yes, sir.

D

Edward G. Lankford—for Defendants—Direct

Q. What is it? A. This is an extract of the Minutes of the Board of Supervisors meeting, held in the County, on Tuesday, March 19, 1968.

Q. Would you read into the record the substance of that resolution, word-for-word? A. "Resolved, that Special Counsel for the County, Mr. Robert C. Fitzgerald, is hereby authorized to submit to the City of Emporia, or its Counsel, an agreement providing for the basis of services to be provided by the County to the Citizens of the City, and the payment therefor, together with other matters regarding transition in the form and word as approved by this Board this date. Be it further resolved that upon agreement on the part of the County and the City of Emporia and the School Board City and County, the Chairman and Clerk of this Board are hereby authorized to execute such agreement on behalf of the County of Greensville. Be it further resolved that if this agreement is not agreed to and executed by all parties by April 30, all services furnished by the County to the City not required by law, shall terminate."

[21] Q. What was the date of that? A. This is an excerpt of the Minutes of the School Board Meeting of March 19, 1968.

Q. I ask that that be accepted in evidence, if Your Honor please.

The Court: So ordered.

(Clerk marked Defendant's Exhibit E-B)

Q. Now, Mr. Lankford, after receiving that ultimatum in March of 1968, when did you enter into a contract with the City? A. The final contract was signed on the tenth day of April 1968.

Edward G. Lankford—for Defendants—Direct

Q. I show you a paper writing and ask you if you recognize it? A. Yes, sir.

Q. Is that the contract of April tenth, 1968? A. Yes, sir.

Q. I ask that this be accepted in to evidence.

The Court: So ordered.

(Clerk marked Defendant's Exhibit E-C)

Mr. Tucker: That's already in evidence.

Mr. Warriner: I'm sorry. Is that your recollection?

Mr. Tucker: Yes, sir.

Mr. Warriner: I hope that Your Honor will permit us to take it and if not, withdraw it.

[22] Mr. Tucker: Plaintiff's Exhibit #7 at the last hearing.

The Court: All right.

Q. Now, Mr. Lankford, why did you enter into that contract? A. I think it's previously been stated it was sort of a shot-gun arrangement; we had our backs against the wall the children were in school, the County had stated that if something wasn't agreed to, they would be turned out on the 30th day of April. We attempted in every way we could, to get a contract that was more palpable, or more palatable than this one, that we finally ended up with, certainly, we didn't want any four-year "purity" involved.

Q. Were you satisfied with the contract? A. No, sir.

Q. In June of 1969, did you obtain new, or different counsel, legal counsel, for your school board? A. Yes, sir.

Q. Did your new legal counsel, who was that? A. It was Mr. Dortch Warriner.

Q. Me? A. Yes, sir.

Edward G. Lankford—for Defendants—Direct

Q. Did your legal counsel, at that time, advise you as to whether or not this contract was enforceable? A. He advised me at that time, that the contract in [23] his opinion, was illegal.

Q. On what ground? A. On constitutional ground, in that we had signed and what was in effect, a blank check for the City of Emporia. We had obligated the City to an undetermined amount of debt, which is illegal.

Q. Now, what was your plan at the time you entered into the contract? What was your long-range plan for education of the City children? A. Well, as I previously said, I personally felt an independent system would be the most satisfactory thing. The joint operation could have been acceptable—could have been agreeable to us, if we could have had the joint operation, where we have, would have had some say so as to the money and the type of education our pupils were going to get.

Q. Now, in the period prior to June of 1969, was the school system, the joint schools,—wait a minute—a joint school with the school system of Greenville continued to operate in compliance with the Constitution of the United States? A. Yes, sir.

Q. So, as far as you know, was the system under which they operated, one that had been approved by The Honorable Robert R. Merhige, Jr., Judge of this Court? [24] A. Yes, sir.

Q. I understand you are not a lawyer? A. No, sir.

Q. Did you, at any time, attempt to interfere with the plan that had been approved by Judge Merhige? A. No, sir.

Q. Did you, at any time, attempt to have them change the plan that had been approved? A. "Them", you mean the County School Board?

Edward G. Lankford—for Defendants—Direct

Q. Yes, sir. A. No, sir.

Q. Did you feel called upon to ask them to change the plan to some other type of plan? A. No, sir.

Q. Did your school board ask that you do that? A. No, sir.

Q. Were you satisfied with the education that the children from the City of Emporia, were receiving? A. We felt that with the plan that had been approved by this Federal Court, that the County was able to operate a reasonably effective school system, and was able to put in the necessary funds to give a reasonably effective education to the children.

The Court: I take it you felt that the children were getting a good education?

A. At that time, with the money that the County was [25] spending, yes, sir.

Q. Were you planning on renegotiating your contract, your four-year contract, that you had? A. No, sir, I don't think I was planning to. No, sir.

Q. Did you think that your school board intended to renew it? A. I believe they felt the same way that I did.

Q. What do you intend to do, or what did you intend to do at the termination of that contract? A. To proceed in your own school system.

Q. Have you given notice to the City to the County, that, whether or not the pending suit, to have the contract declared void, is successful, that you intend to terminate that contract at the earliest possible day? A. Our counsel has given—

Q. At your request? A. At our request, yes.

Q. I show you a paper and ask you if you recognize it? A. Yes, sir.

Edward G. Lankford—for Defendants—Direct

Q. What does it purport to be? A. This is a letter from the County, the Council, the City School Board and City Council, addressed to the Board of Supervisors, Greenville County and County School Board of Greenville County, stating [26] its position in the contractual arrangement and that they will be terminated effective July 31, 1971.

Q. I ask that this notice be accepted into evidence.

(Defendant's Exhibit E-C)

Q. Now, Mr. Lankford, in June of 1969, the Court entered an Order changing its prior plan and instituting a new plan for mixing in the schools. It was after this Order was entered that your School Board took action to set up a separate, independent school system for the City of Emporia. Why did this Order precipitate action on your part?

A. We felt confident that with the complete change in school systems to a unitary system, we felt that the County, particularly the County Board of Supervisors, was not able to successfully operate such a unitary system. We felt that with the cost of transportation increasing, with certain things that should be done in a unitary system to improve educational opportunities and quality, monies would have to be expended. We felt that the County Board who controls the purse strings of the County School Board, were not willing to expend these monies to be—to establish excellence in the school system. We felt that they had no desire to effect the assimilation of the races in the unitary system.

[27] Q. Did your School Board have such a desire? A. Yes, sir.

Edward G. Lankford—for Defendants—Direct

Q. Did your School Board, was your School Board, able to do this work? A. We believe so, yes, sir.

Q. Why didn't you wait until the expiration of the contract period? A. Having been advised that the contract was illegal, we felt the time to move was immediately.

Q. What steps did you take? A. First of all, we made application to the State Board of Education, to establish the City of Emporia as a separate School Division. This will enable us to have our own superintendent, responsible just to the City, rather than sharing a superintendent with the County of Greenville as it is now set up. Second of all, we will participate in asking the Council for the City to file suits in the Circuit Court to establish the equity in our school buildings that we feel are properly ours. We ask that they file suit in the Circuit Court to void the contract due to its being illegal. We then felt that we wanted to, if we were going to go independent, we wanted to put excellence in our system. We wanted to make a system which would attract people to our community, [28] rather than draw them out. We wanted a system whereby our industrial relations people in the City could say here, we've got one of the finest systems in the south side of Virginia, when they are talking to industry. We wanted a system that would hold the people in public school education, rather than drive them into a private school, or, making them drop out before their education terminated.

We sought the best advice that we could get. So we communicated with Dr. Wilkerson.

Q. Well, let me ask you this, would the type of school program that you envisioned and that you have outlined in brief, to the Court, would that be in the best interests of the school children for whom you are responsible? A. Yes, sir.

Edward G. Lankford—for Defendants—Direct

Q. Let me ask you, Mr. Lankford, was race a factor in your decision to create an independent school system? A. Yes, sir, it was a factor, but not in the sense that we wanted to perpetuate a segregated school system. Race, of course, effected the operation of the schools by the County and I again say, I do not think, or we felt that the County was not capable of putting the monies in and the effort and the leadership into a system that would effectively make a unitary system work and result with quality education, as [29] well.

Q. Since August of 1969, have you attended any of the meetings of the County School Board? A. Yes, sir, I have attended three, I believe. I was formally invited by the Chairman of that School Board on the first day of October.

Q. I show you a paper writing and ask you if you recognize that? A. Yes, sir.

Q. What does it purport to be? A. It is a letter addressed to me, signed by S. A. Owen, Superintendent.

Q. The date of it? A. October 1, 1969.

Q. What does this letter say? A. In substance, well, you want me to read it?

Q. Go ahead. A. Mr. Lankford: The Greenville County School Board would like to—

Mr. Tucker: Let me see that.

A. "Dear Mr. Lankford, The Greenville County School Board would like to invite you to attend monthly school board meetings anytime you see fit. Regular monthly meetings are held the second Tuesday of each month at 1:30 o'clock in the school board [30] "office."

Q. What's the date of that? A. October 1, 1969.

Edward G. Lankford—for Defendants—Direct

Q. I ask that this be accepted into evidence. Pursuant to that invitation, if you can call it such, did you attend school board meetings? A. Yes.

Q. At these school board meetings, was your opinion requested on any matters which arose? A. No, sir.

Q. Were you permitted to vote on any matter?

Mr. Tucker: If Your Honor please, all this is after the fact. That letter is September?

Q. October First.

The Court: I don't see the relevancy of this.

Q. I see where it is relevant in this case. The only relevancy, Your Honor, is that at the last hearing Your Honor cross examined witnesses closed on the question of their attempt to work with the County School Board. I was attempting to show to Your Honor that these attempts before and after the fact are fruitless. This is the purpose of it.

Mr. Marsh: Your Honor, the minutes of the meeting would be evidence of what happened at [31] the meeting. I don't think the witness' testimony as to his attempt to questions and refusals is—

The Court: Yes, I think that is true: I don't know. Are you through, Mr. Marsh?

Mr. Marsh: Yes.

The Court: I don't know the materiality. I think I see the point but you are not getting at, but you have been there for some time, Mr. Warriner, that the City and County is just, the City and the County just haven't been able to work things out, I don't mind, actually, but I am distressed, disturbed, that

Edward G. Lankford—for Defendants—Direct

the County has no position in this matter. I am very much disturbed about that and I view it in fairness, I must say I do it rather skeptically that they have no position. It is not your fault, I know, so in view of that, in fairness, I want you to go ahead and put in within reason, what you want.

Q. I am sure Your Honor means both of the things, Your Honor says you are skeptical of it and you know it is not our fault. That is only part, the only part that concerns me. I don't want Your Honor to believe that I consciously, or that somebody—

The Court: I want you to put in the record, within reason, the City's attitude. I think [32]. I understand what the evidence shows thereafter, to be.

Q. We would like to show evidence that there is no collusion between these two political bodies; if there is any question in the Court's mind.

The Court: Why don't you just ask him. I know what he will say, of course, knowing ahead, but ask him and I am sure he will say it sincerely and truthfully.

Q. As long as Your Honor understands that he is saying that I—

The Court: You don't want to clutter it up, let me say this, now, before we go too far. I think the matter now is in a different posture and less difficult in the calmness of December than it was. Hopefully, all of these matters can be considered in a calm

Edward G. Lankford—for Defendants—Direct

atmosphere. There are a lot of matters I am disturbed about. I am disturbed about the thought that the brief you and Mr. Kay filed, was an excellent brief. I am not disturbed by it, it is very helpful to the Court and I will ultimately get one from the other side. It is an excellent one. One of the best briefs that I have ever seen, but there are a lot of things I am not sure of. It is the duty of this Court to order [33] children, and I don't mean, yes, I am skeptical that the big push comes. Not integrated schools, unitary schools, didn't really happen before. Mr. Warriner, you go ahead and put in what you want.

Q. I think in candor that work is almost wholly the work of Mr. Kay. I hate to have to say that.

The Court: It really is excellent.

Q. Mr. Lankford, directly has there been any collusion between the County and the City in the matter of the separate school system? A. No, sir, in fact, there's been very little communication between the two bodies.

Q. Have they assisted you in any way to set up an independent school system? A. No.

Q. Have they cooperated with you to that end? A. No, sir.

Q. Has their attitude been cooperative or antagonistic? A. Certainly has not been cooperative.

Q. Describe their attitude. A. It's been sort of taking no position in the matter.

Q. In the matters which are being presently litigated in the State courts, so far as that your School Board is involved in, have they been acquiescent in the effort on the

Edward G. Lankford—for Defendants—Direct

part of the City? A. No, sir, they've been fighting us every inch of the [34] way.

Q. Do you have, with respect to the children that you are sponsoring, their instructions; do you have any—any of your Board have any control of the hiring of the teachers? A. No, sir.

Q. Do you have any control over the setting of the salaries? A. No, sir.

Q. Do you have any control over the curriculum? A. No, sir.

Q. Do you have—

The Court: Mr. Lankford, excuse me. You may have already testified what action, if any, besides talking to lawyers, did you—what legal action did you all attempt so that you would get, so you could say something about the teachers and curriculum? Were you all just a Board discussing this or were you—

A. Our efforts were directed after the, or, originally directed toward establishing some type of a joint operation, where we could have co-operation.

The Court: It came to pass because of the lack of co-operation on the part of the County?

A. Well, one of these contracts that I think we had, indicates that we would have.

[35] The Court: But you never went to Court about the contract until now, isn't that the truth?

A. That's correct, sir.

Edward G. Lankford—for Defendants—Direct

The Court: All right.

Q. When did you obtain a lawyer who advised you that the contract was illegal or violative of the Constitution?

A. In June, I would say, June of this year, June of 1969.

Q. Did your prior counsel give you any such advice?

A. No, sir.

Q. Did your prior counsel cease his employment as a result of the Order from Judge Merhige in this suit? A. No, sir.

Q. What reason did he cease his employment? A. He was hired—

Mr. Tucker: Excuse me, I hate to interrupt; I don't think it is material.

Q. I think it is material because His Honor has indicated, if Your Honor please, that it is a matter with which you are concerned.

The Court: He was discharged, as prior counsel is that what you want to get in the record?

A. Prior counsel is deceased—died.

Q. It had nothing to do with having to do with the schools? A. No, sir.

Q. He just died of his own accord? [36] A. Yes.

Q. If Your Honor please, this is fact.

The Court: I am not laughing. I know it is a serious matter but dying of his own accord—

Q. I am afraid that I should not have stated it that way. A. Passed away because of natural causes.

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Q. That's correct. Now, would you have—you have outlined briefly, I think, the steps that you have taken in order to obtain a right to have an independent school system if the Court would permit you to do so, in taking of these steps, Mr. Lankford, have you sought the advice of counsel as to whether the steps that you have taken would be violative of His Honor's injunction? A. Absolutely.

Q. Have you been advised by counsel that you were violating the injunction, or the, that you were not violating it? A. That we were not in violation of the injunction.

Q. Now, what is the status of your application to the State Board of Education for a separate school division? A. We submitted a resolution to them on the 20th of August. Their action at that meeting in Williamsburg was that they would table the resolution.

[37] Q. For what reason? A. Until this pending litigation was cleared up in Federal Court.

Q. Now, even if your application for a separate school division is denied by the State Board of Education, are you legally in a posture under which you can operate a straight school system? A. Yes, sir.

Q. Now, explain to His Honor how that comes to be. How that is a fact.

The Court: I think I can. That is a matter of law, isn't it.

Q. It is a matter also, if Your Honor please, it is a matter of operation of schools in Virginia but, if Your Honor please, if Your Honor is aware of that law, then, there is no problem.

The Court: Well, let's see what your position is.

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Mr. Tucker: My position is that it is a matter of State law. The witness is not an expert as to what is legal. It is, I think, a matter of law.

Q. They can discuss it in briefs, if they want. I show you a paper, writing, December 7, 1967, and I ask you if you recognize it. A. Yes, sir.

[38] Q. Who is it to and who is it from? A. It is addressed to A. G. Slate, Greenville County School Board and me, Edward V. Lankford, Jr., incorrectly, as the Chairman of the Emporia City School Board.

Q. And, who is it from? A. From Woodrow W. Wilkerson, Superintendent of Public Instruction of the Commonwealth of Virginia.

Q. What is that date? A. December 7, 1967.

Q. Is there any portion of that letter having to do with the operations of the separate school division; or separate school district, excuse me? A. I am not sure of the question.

Q. Is this letter, does it pertain to the operation of a separate school district? A. For the City of Emporia?

Q. Yes. A. There is reference in here, yes.

Mr. Tucker: Excuse me one second.

Q. Would you read that letter? A. Dear Messrs Slate and Lankford: This is to advise that the State Board of Education at its meeting last Friday, established a new school division consisting of Greenville County and the City of [39] Emporia, effective December 1, 1967. This means that each political sub-division has its own school board and one superintendent will serve both boards. In this connection, I would call your attention to Section 22-34

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of the Virginia School Code which provides that the school boards of a school division shall meet jointly for the purpose of electing a superintendent. I take this opportunity to express to you the desire of the department to render every assistance possible in connection with your efforts to further strengthen your educational programs for the boys and girls of the County and City."

Q: Now, Mr. Lankford, whether or not you operate as a separate school district or a separate school division. Has your school board adopted a school assignment plan?

A. Yes, sir.

(Defendant's Exhibit E-E, marked for identification)

The Court: Let me just make this suggestion, in the interest of keeping this record down, Mr. Wariner, it occurs to me that there are two issues in this case at the moment. One, is the right of the City of Emporia to just operate [40] their own school system. There doesn't seem to be too much argument about that. If we didn't have other factors involved. Then, the second one is, what effect does it have on the plan that's been approved, that is Greenville County plan, because Emporia is now a party to this suit. I believe it appears to. It sure feels like they are.

Q. Yes, Your Honor.

The Court: They are a party to this suit and I am satisfied that assuming this injunction is lifted and they go forward with the plans, they are going to present a plan to the Court to be considered and

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approved or disapproved. I don't see the materiality of what their plan is, at this time, I am willing to take representations of counsel, if counsel are at least satisfied that it conforms to the requirements of the Constitution.

Q. I think it would be helpful to Your Honor if we put it right into evidence. I have it here, it is just very brief.

The Court: The main thing that I am concerned with in this case, is the effect it has on the plan that is already in effect. So, you've got to balance the legal rights of Emporia and then we've got the equitable problem. This is a matter [41] of equity. There isn't any doubt from the evidence I have heard before, so I do think this plan is going to be amended somewhat before my opinion would have violated, absolutely, the Greenville plan.

Q. We have a witness who will testify immediately after Mr. Lankford, on the question of what the present system is; its advantages and disadvantages and how the City system would be an improvement over that. I think that, I think that Your Honor will be able to compare then the questions that are in your mind about what effect does it have.

The Court: Well, the purpose, what is the purpose of introducing this evidence, to show that these people want quality education?

Q. The prime purpose if Your Honor please, it is to show they will not have to, they do not intend to deprive any person of his rights under the Constitution of The United States and we believe that once we show that, the

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inquiry ends, but once we show that no one is being deprived of his Federal protective rights the inquiry of this Court ends. We understand that is not the Court's position, therefore,—

The Court: I don't know, I have no position on it, as I said before; this is a much—a more different situation than it was in August.

[42] Q. August 8.

The Court: Well, at least these are very difficult times. I don't know about you all, but it certainly was for the Court, on a daily basis, very, very difficult times and all the internal things we were told were to come to pass, didn't come to pass.

Q. We didn't put any evidence in the—

The Court: Well, others did.

Q. We want to be judged by the evidence we put in.

The Court: The evidence I had, I was satisfied at that time, I would have scuttled the Greenville plan and would have made it impossible but this was then and now it is a different time. I am not sure this matter is material at this stage.

Q. May we put it in the record for whatever it might be worth?

The Court: All right.

Q. Mr. Lankford, will you read to the Court the plan that has been adopted by your City School Board for the oper-

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ation of the schools? A. This is a certified copy of the minutes. Do you want me to read the entire minutes, or the plan?

The Court: Hand it up to me and I will [43] just read it.

Q. I would like for it to be in evidence, please. (Handed same to the Court).

(Defendant's Exhibit E-F).

The Court: All right sir, I have looked at it.

Q. Now, Mr. Lankford, in order to effectuate the plan that His Honor has just read, what practical steps have you taken insofar as setting up the budget and a school assignment plan and that type of budget and that type of thing?

Mr. Tucker: If Your Honor please, we have been quite patient with all this prospective business, but I think all this is immaterial to the issue that is before this Court to decide as to whether we are permitted to go—

The Court: That is what I say. I am satisfied to let the other side complain. I am satisfied that if this injunction is lifted that there is reasonable prospects that the children of Emporia will be, well, I am satisfied because I think they want to do, to operate within the law. The school system. But, they will, in any event, because this Court has not got to approve any plan. That is not the issue. The issue is, what effect does it have on Greenville and is that

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legally [44] material, that is, I think that is the issue. Do you know what is material about this letter. Let the record show they contemplate a system whereby there will be 50% of the student population, will be the Negro race and 50% will be the Caucasian race. Isn't that what it is going to be?

Q. That is roughly the population of the City. It will be nothing artificial about it, it will be what naturally lies there.

The Court: Well, I don't want to clutter this record with a plan that we may have to go in to in some detail, if this injunction is lifted, as well as having to go in some detail and I don't think it is material except to say that I am satisfied that the City of Emporia will operate, they will operate it as required under the Constitution.

Q. And, it is the desire of the officials, they want to do that, but if they did want to, or if they didn't want to do it, any way. It makes a difference whether they wanted to or not. At least it seems that way to me.

The Court: Well, we'll get around to that plan, but I think they do.

Q. Would you give me two minutes to cover this and confer [45] with my co-counsel?

The Court: If you think I am wrong, legally, tell me, but I don't see any sense in cluttering up the record at this time. Mr. Marsh, let me say this because if the Court determines that it is material to the legal problem that we have here, I will let

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you put on anything you want, but I have another hearing for that purpose.

Mr. Marsh: Well, I think that would, frankly, if Your Honor please, what we are attempting to do, was to answer the questions that the Court raised at the last hearing. The Court pointed out several times that the atmosphere is somewhat different now and I would say this, as long as the Court—

The Court: If you want to examine, examine as to what effect the, the legal effect it will have on Greenville, if it is approved; maybe not, but I think that is it.

Mr. Marsh: I would propose to do it at any time since it appears Your Honor is satisfied as to the good faith and motives of the City and of their desire to effectuate a school system in Greenville, or excuse me, in compliance with the Constitution. I would like to submit the budget.

The Court: Well, this is not to say that [46] I am satisfied that the Courts—I don't want to intimate I am satisfied that all of this desire was precipitated just by a desire. I think the school plan, the Court's plan Greenville has something to do with this desire. I do, but that may be completely immaterial, as a matter of fact, Mr. Lankford has said that it was one factor and he's given—

Mr. Marsh: Well, of course—

The Court: —and it is understandable and I don't think it is bad, but I don't want you to misinterpret my remarks. I think the school's plan,—I'm not satisfied yet, that this would have come to pass, had not Green vs. New Kent been decided and had not other actions been decided, but that might not be

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legally bad. People have the right and they want the best education for their children.

Mr. Marsh: Well, with the understanding that it will be developed at a later time that these matters, inquiries into not only what the motives were, but how it was actuated, if that becomes pertinent, with the understanding we can put on more evidence, I will put on the budget.

The Court: I think the people have legal rights of motivation but it may not be a factor the [47]—it may not be a factor for the Court to even consider.

Q. Mr. Lankford, I show you a paper writing that purports to be a budget for the City of Emporia schools and I ask you if you recognize it. A. Yes, sir.

Q. Was this budget adopted after consultation? A. Yes, sir.

Q. With whom did you consult? A. We consulted with the Dr. H. I. Willett.

Q. Was this budget adopted by the School Board of Greensville County? A. Yes, sir.

Q. Was the budget adopted by the City Council of the City of Emporia? A. No, they stated that they could adopt such a budget.

Q. I ask that this budget be accepted into evidence.

Mr. Tucker: I just want to remark that we don't see the materiality to it.

The Court: I understand but I am not going to examine it at this time.

(Defendant's Exhibit E-G, marked for identification)

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Q. By agreement of counsel we are also putting into evidence the additional exhibit in evidence having to do with the State Board of Education. I have no further direct examination at this time.

[48] *Cross Examination by Mr. Tucker:*

Q. Mr. Lankford—excuse me.

(Defendant's Exhibit E-H, Letter from Superintendent of Public Instruction, Mr. Woodrow W. Wilkerson, to Mr. E. V. Lankford, Jr., Chairman, Emporia City School Board, Emporia, Virginia, dated 22 September 1969; Defendant's Exhibit E-I, Excerpts from Minutes of State Board of Education Meeting held August 19-20, 1969, certified by Woodrow W. Wilkerson, Secretary State Board of Education)

Q. Mr. Lankford did Mr. Warriner give you a written opinion as to the constitutionality of the contracts between the City and the County? A. No, sir.

Q. Was that Opinion given to the Council in an open meeting? A. I do not attend all of the City Council meetings.

Q. When were you apprised of Mr. Warriner's opinion? A. Verbally, some time during the month of June in a discussion that we had.

Q. During the month of June? A. I can say that to the best of my recollection, it was some time during the month of June; I can't recall the exact date.

Q. You are certain it was then at the July 14th meeting of **[49]** the Council at which, according to the Minutes of the

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meeting, Mr. Warriner pointed out that the contract could be terminated through mutual agreement of both parties, or an "annexation" by the City, it was before that July 14 meeting? A. I assume it was, yes, sir.

Q. He gave you that Opinion speaking to you as one individual, not to a group? A. As I recall, yes, sir.

Q. Not in the form of a council meeting? A. No, sir.

Q. No further questions.

Redirect Examination by Mr. Warriner:

Q. Did I at any subsequent time, furnish you with a written opinion? A. I believe there is, after that question was answered, I think I've got something in my file as to the written.

Q. Would you check your file, please? A. You may check your file, too.

The Court: Why don't you lead him a little, Mr. Warriner?

Mr. Warriner: Sir?

The Court: Don't you have a copy of that?

Mr. Warriner: I am going to put it in [50] evidence since the question was raised by counsel for the plaintiff.

The Court: Give Mr. Lankford the date of your letter so he can find it.

A. I have it.

Q. Yes, is that the Memorandum of Authority which I gave you? A. Yes, sir.

Q. I ask that this be accepted in evidence.

The Court: What is the date of that?

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Mr. Tucker: What is the date? That is what I want.

The Court: What date did Mr. Lankford get it, that is what we are after.

Mr. Warriner: It would have been some time in November, I guess, I don't want to explore the significance of the date, I don't understand that.

The Court: That is what material that is the only thing the counsel was making inquiry about, was the date. He wasn't taking inquiry as to your correctness of your Opinion.

Mr. Warriner: Well, I would like to put this in evidence, since he's raised the question as to whether I put one in.

Mr. Tucker: I'd like to see it before it is offered into evidence.

[51] Mr. Warriner: I'm sorry.

The Court: You all take your time and look at it some time during the recess and we will get back to it.

Mr. Tucker: I can state the objection; it has no date; I object to its being entered.

The Court: Is there any further examination? I think the objection is well taken, the materiality is the date and doesn't seem to be a date. Is there any further examination of the witness?

Mr. Warriner: No, if Your Honor please.

The Court: Now, Mr. Lankford, let me ask you, you all plan on offering contracts to any teachers that are now teaching in the Greenville County? A.

We will employ teachers as needed.

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The Court: Well, will you employ somebody who is going to leave Greenville to come with you?

A. I think so, yes, sir.

The Court: Now, unquestionably, that might well have an effect on their school system as it now operates under the Court-approved plan, would it not?

A. They have, they would have a surplus of teachers [52] that they would not employ any longer.

The Court: But you would be, in effect, in competition to some extent, in hiring teachers?

A. Yes, sir.

The Court: And have you all given any consideration to the fact that you would get some teachers from that system?

A. No, sir.

The Court: Haven't given it any consideration?

A. Haven't given it any consideration, well, haven't talked to any teachers on an individual basis.

The Court: Has your School Board?

A. Well, realizing they would have a surplus of teachers in the County, we will be able to hire them.

The Court. Would it effect your plan if you could not, in fact, or law, hire any of those teachers? Would that have any basis on what you all plan on doing?

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A. Good teachers are hard to come by. I would think our budget contemplates a reasonably high salary schedule and would probably attract teachers from outside of that area. Whether we would have an adequate number, I can't say.

The Court: Do you have any alternate plan if you burn your budget, so to speak, and you are [53] not getting along with the County, do you have any reason to believe that if this doesn't work out, what is going to happen to the children of Emporia, would you continue on with the County?

A. You mean, when the contract is terminated?

The Court: Yes.

A. I would certainly hope so, but of course, the current—

The Court: You are ready to pay more money?

A. Certainly—definitely.

The Court: It is in the record as to how many children will be taken out of the system and the racial composition of each?

A. I think it is.

The Court: Yes, it is on the record.

Mr. Tucker: Yes, Your Honor.

The Court: What is the significance, or lack of significance of approval by the State, of making you a division or a district, or what? What is so important about that?

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A. Well, we feel that to establish the excellency of an educational system that we would have to have a superintendent that we can call our own; that we don't have to share him with anyone else.

[54] The Court: You have to be what, to get that?

A. We have to be a School Division.

The Court: So, as long as this suit is pending, as I understand it, the State is going to permit you to be a School Division?

A. No, sir, they tabled it.

The Court: I don't want to discontinue you, but this suit is going to be pending here for an interpretation of the law for many years.

Mr. Warriner: If the Court Please, I don't believe it is, because the pendency of the suit, it is because of the injunction.

Mr. Gray: In August, that—

The Court: Well, if you are a Division, you can hire your own Superintendent?

A. Yes, sir.

The Court: You all discuss that, as to whether you would take a superintendent, the superintendent over in Greensville.

A. No, sir, we haven't discussed any particular superintendent; we have included it in the budget, the amount of money that would secure a qualified superintendent.

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The Court: It would be your superintendent, [55] alone, not—

A. It would be our superintendent, alone.

The Court: And you would not share him with anyone else?

A. No, sir.

The Court: Did the Court's questions prompt any additional questions?

By Mr. Warriner:

Q. Mr. Lankford, do you contemplate any sort of a raid on the faculty of Greenville County School system?

A. No, sir.

Q. What do you—are you going to go for the Greenville County School system? A. No, sir.

Q. What do you—are you going to go for the Greenville County School system or are you going to be in the open market for school teachers? A. Well, in the open market for qualified teachers fits into our system, which we feel will be for excellent teachers.

Q. Have you set up a teachers' salary scale that would attract— A. We think.

Q. Which will attract a qualified Superintendent of Schools? A. We feel we have, sir.

Q. And, have you discussed with your consultant, Dr. Willett, the type of superintendent that you would need and the type of faculty that you would need? A. Yes, sir.

[56] Q. Do you have set up any particular programs within your system that would help you effect a transition

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to a unitary system and the maintenance of a qualified system of school excellence? A. Yes, sir, we have, and because of that, we feel that we are going to have to pay slightly higher salaries to attract people who have experience in non-graded primary schools, kindergarten, and so forth.

Q. What's that? A. Non-graded, primary-type schools.

Q. What is that? A. It is a system of school, a school system which is becoming effective in some areas. Now that takes, first of all, our budget excludes a kindergarten operation which hasn't been tried in the south side of Virginia yet, so take the kindergarten, 1, 2, 3 grades and call it a non-graded primary level of education. Realizing that, environment, background motivations of—are different for all children coming into our system. We feel that this non-graded system will allow those highly-motivated children, to go through this so-called four-year level.

The Court: You can object for the record [57] but this, I want to hear. I think I will take back what I said. It may be very material. Go ahead.

A. The primary, kindergarten, 1, 2, 3 grades would be a really, a four-year level for the average child, because in such a level of education, their learning is, they are learning the tools with which to further their training. They are learning reading, writing, arithmetic, basically, and by the time they get through the third grade and into the fourth grade, then they begin to use these tools to study particular subjects. So theoretically, you would want to have all children, when they go in the fourth grade, somewhat equal in their abilities with these tools of education. So, if you confine it to a particular graded

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system, it seems to me that does not work quite as well as a non-graded system. Non-graded systems, as I say, the average child may go through the four years. Those are highly motivated, may go through in three years.

Q. You mean the bright ones are in one class and the others in other classes? A. No, I am no expert in education. This is what I have been told and been advised.

Q. By whom? A. By Dr. Willett, who is—

[58] The Court: You mean, is that your understanding?

A. I think so, essentially, that is what it—it brings, attempts to bring, everyone up to the same degree of ability.

The Court: That will continue what, through just through the first?

A. Through the first three grades, including kindergarten.

Q. Is this kind of a system, something new? A. It is in our area, yes, sir.

Q. Is this something recommended by Dr. Willett to help assimilate a unitary school system? A. Yes, sir.

Q. Now, you mention some other advantages to help you in a transition to a unitary school system, what are they? A. Vocational education, of course, is quite important because of the drop-out level in the higher grades of school. Individual study should be stressed in more areas. We, in our budget, we have included \$25,000,00 I believe, for aids.

Q. Teachers' aids? A. Teachers' aids which will relieve a teacher of day-to-day school burden of school work, such as grading papers and allow the teacher to spend

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more time with the pupils. The teacher-pupil ratio is somewhat [59] lower than exists down there. We feel this would be a great asset. We realize we will have a small school system.

Q. How many would you have, altogether? A. Approximately 12, 1300. But a small school system is easily adaptable to these areas that we feel are excellent, in some cases, are really experiments in new types of education.

Q. What about the field of health, medical— A. The budget includes the sum of \$31,000.00 for two full-time nurses and part-time physician to give continuing health examinations, treatments, and so forth, to all children that come in the school. I think this is most valuable in a unitary system because so many of the children will not have the advantage of health examinations.

Q. To your knowledge, is Dr. Willett, has he had any experience in the field of education in transition to a unitary school system? A. He was Superintendent of the Richmond City Schools for twenty-two years and I believe that he can successfully try to make the transition to such as this.

Q. Is Dr. Willett continuing as a consultant to your school system in an effort to attempt a successful [60] unitary school system? A. Yes, sir.

The Court: What, is that your opinion?

Q. Yes.

The Court: I have ruled it out.

Q. All right sir. You mention vocational education, what does that mean? A. That means training the student

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who would expect to go no further than the high school education; training him to go out into the community with knowledge to get a good job.

Q. Mr. Lankford, if the Court permits you to do something—

The Court: Let me retract my previous thinking. I am going to let you put the plan in. I now have changed my mind, I think it may be very material to the Court's ultimate decision.

A. I might say that the budget has an element in it that includes most of these things that we have discussed.

Q. It is, to a certain extent, in evidence, but I'd like for Mr. Lankford to explain it. Go ahead and tell the Court what you plan to do for the children. A. We plan to offer them the school system with a degree of excellence that nobody has been before in our area of Virginia. We feel that we can make a unitary system work to such an extent that people [61] will say, "Now, look, this community has got a system that works and this should be applied throughout the South." We feel that we can do it.

Q. Explain this non-graded concept as best as you can.

A. I'll try to. Maybe I left out a few things. To me, in the unitary system, it would be an ideal thing, because those children who may be slow to learn may take five years to go through this non-graded area. The average children in four years and the brighter children, in three years. But, at the time they get to the four grade, they should, theoretically, all of them, have all of these tools ready to continue their education and then not be continually dropped back from grade-to-grade, as they may fail. The present system, of—

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Q. Let me ask you this, does this mean that that child who is doing poorly in one subject is held back in that subject, or that he is held back in all subjects? A. No, he is not held back in all subjects. They stress the subjects that he may be a poor reader and they devote a lot of time to his reading and let him move ahead as his ability goes.

Q. Does this non-graded system mean that there will be segregation on the account of color? A. No, sir.

Q. Even any some sort of a DeFacto segregation on account [62] of color? A. No, sir.

Q. Is there any part of this non-graded system that relates to the fact that children by being in contact with others, that are moving more rapidly, obtain the desire to move more rapidly themselves? A. I believe that would be correct.

Q. So you would roughly, have children from kindergarten through the third grade, working together? A. Yes, sir.

Q. All four grades working together to obtain the level of fourth grade, is that the idea? A. Yes, sir.

Q. That system, this whole system that you are relating to the Court, I assume, costs money? A. Yes, sir. Now, the non-graded primary area, in effect, doesn't cost a great deal more money. You may have the same number of teachers as you would in the normal grade, but the teachers each would probably have to be paid more because they would have to have some experience in this type of education.

Q. What indication do you have of the willingness to pay this money? A. It will be reported, we have a record in the budget, [63] the budget indicates that for the year 1970-1971, the local funds necessary to come from the

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City is I believe, \$26,000.00. That is nearly twice as much as the City paid under the current contract year of 1967-1968. The School Board presented this budget and it was unanimously adopted to present to the City Council. The City Council unanimously accepted it for inclusion in this budget and when the time comes. I believe that indicates that the Council is willing to—

Q. Do you believe that the City, the citizenry, the tax payers, would support this budget? A. Yes, sir, I think so.

Q. If permitted by the Court to do so, Mr. Lankford, can you make a unitary school system work in a City?

A. Yes, sir, I firmly believe we can, with a great degree of excellence.

Q. Thank you.

The Court: Mr. Tucker?

Mr. Tucker: I have two or 3 questions.

Examination by Mr. Tucker:

Q. Do you have any idea, Mr. Lankford, as to what percentage of the teachers in the present system live within the City of Emporia? A. I don't, sir. I really don't, but there is a great [64] number; I would guess half, at least.

Q. We will assume half of the teachers in the— A. Yes, sir.

Q. System are living in Emporia; probably a lot more than that? A. Possibly so.

Q. I see, and you expect to be paying teachers higher salaries than the County will be offering? A. Our budget contemplates the increase provided by the State. I don't know specifically, of course, they haven't, the County hasn't set their budget; I don't know specifically whether

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it will be higher. We feel we will be in range to attract desirable teachers that we need.

Q. You won't refuse to hire a teacher because he or she has been previously, or is presently, or has been previously employed by the County School Board? A. No, sir, if she was qualified and made application.

The Court: All right, you won't give any thought of amending your plan to include a provision that you would not hire any teachers with any, from the County system?

A. Yes, we would give thought to that if it meant we would be free to move in the direction we want to go.

[65] The Court: All right. Anything else? Mr. Gray?

Mr. Gray: I want to make it clear to the Court that any counsel that have been waiting—(Went off record)

This trial then at 11:30 A.M., recessed until 11:50 A.M., at which time it was reconvened.

NEIL H. TRACEY, having been called as a witness, was duly sworn by the Clerk, and testified on his oath as follows:

Examination by Mr. Kay:

Q. Doctor Tracey, would you please state your full name and address? A. Neil H. Tracey, 415 Richfield Road, Chapel Hill, New York, Professor of Education at the University of New York.

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Q. And, were, where were you born, Doctor; Tracey?

A. North Dakota.

Q. And how long did you live there? A. Twenty-two years.

Q. Would you briefly outline to the Court, your educational background? A. I received a Bachelor of Science Degree at North Dakota State University in mathematics and my Master of Education Degree at the University of South Dakota in School Administration; my Doctorate Degree at the University of Colorado in School Administration.

[66] Q. And when did you receive your Doctorate? A. 1958.

Q. Before obtaining your Doctorate, would you relate your occupational experience for the Court? A. Teacher of Mathematics and Science in high school; I was a teacher in high school for about three years; high school principal for three years; Superintendent of Schools for five years and part-time instructor in School Administration at the University of South Dakota, then the University of Colorado and then to the State Teachers College which is in South Dakota.

Q. Where did you do your teaching and where are you at present and where are you to be in September? A. In South Dakota.

The Court: The Doctor is qualified in this field.
Mr. Warriner: No objections.

Q. When did you come to the University of New York? A. In 1958.

Q. And in what capacity have you served there? A. Basically I am a teacher and have gone through the ranks

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of professorship, assistant professor, associate professor and full professor.

Q. What are your duties as Professor of Education?

A. I teach school Administration classes primarily in [67] Central Office Administration, that is school finance planning, and so forth. Direct field studies dissertations for graduate students in school administration and incidentally, I am chairman of the administration curriculum group at the School of Education.

Q. And, as part of your duties or Professor of Education, do you do any consultation work in the public school system in New York? A. Yes, do you want me to give you a short run down on that?

Q. Give us a short run down of what type of consultations. A. All right, the, about three, there are about three kinds of consultations which have been involved. One has to do with the curriculum studies in the Waynesboro schools in New York; curriculum studies in the Ridgely area in New York and in Orange County which is the home county of Chapel Hill, School survey, which is examination of school organization and operation for planning purposes in Rockingham, New York, Orange County, Chapel Hill and Perrin County and two or three other places.

Q. Have you worked as a consultant outside of the State of New York. A. Yes, primarily in Virginia, with the administration organization pattern for Portsmouth and with the [68] annexation cases in Alexandria and Richmond and with a similar court situation in Portsmouth.

Q. Now sir, at the request of the City of Emporia, did you make a study of the school system of Greenville County? A. Yes, I examined certain elements of the evidence and visited the school system there.

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Q. What was the purpose of this study? A. The major purpose of the study was to examine the organizational pattern and the effects on that organizational pattern of the separate, or possible separate school systems for Emporia.

Q. Now, sir, at the time that you were approached to accept this assignment, did you place any conditions on your acceptance? And if so, what were they? A. Yes, I placed this basic condition on acceptance of any such assignment, that the intent of the people involved, the Emporia people in this instance, should be specifically not related to any attempt to resegregate or to avoid desegregation or to avoid integration.

Q. And, if you had ascertained that this was the intent, what was your understanding with the City? A. My understanding was that I would not serve in this capacity, at all.

[69] Q. All right, sir, now, would you describe briefly how you approached the study that you made in Emporia? A. (No response)

Q. In Greensville County? A: Well, basically I started out with the idea of examining the pattern of education as it existed in the County. The organizational pattern as the Court has ordered and is now operative, the financing, the budgetary considerations that in effect, support and direct the program that a school system might have and beyond that, some of the school visitations were to determine what conditions existed in the schools and in examination of certain facilities therein, to determine their sufficiency or effectiveness.

Q. Would you state whether or not, in your opinion, that the effect of historic segregation of races in the public schools, i.e., should be eliminated purely by proportionate

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mixing of the races? A. No, my basic contention is and has been, that elimination of the effects of segregation must be an educational solution to the problem and that no particular pattern of mixing has in and of itself, has any desirable effect.

Q. Would you elaborate a little bit on what you conceive to educational solutions to this problem? [70] A. Well, as the Court held much earlier, separation was inherently unequal. Separation has produced an inbred system as to speak both for white and for the negro group. The inbred systems have become different. So the problem is to permit difference and the Negro system is unfortunately, has become inferior. The problem is to permit the Negro child to integrate into society both in terms of general social problems and in terms of economic patterns. The educational system as it, as the means to this end and therefore particular educational programs have to be set up and put into operation in order that this may be that this integration may be completed.

Q. What types of special programs do you have reference to? A. Well, there are several items that characterize these programs. The first is a basically early access to educational resources.

Mr. Tucker: Excuse me, I didn't hear that.

A. Early access to educational resources there is characterized, while I would not like to point to the success of Head-Start, because it hasn't been completely successful, characterized by the ideas of Head-Start, characterized by the idea of this kind, characterized by a whole series of community [71] action programs that are intended to involve the child in an integrated social and educational society quite early in his development. The need in this same context, the child who is to be functional in an integrated society needs

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an early contact with the inter-races complex of the society, rather than being removed or separated. Because, there is an educational deprivation to overcome. The child usually, in this case, is Negro, but any other child or any other kind of isolated child such as an Appalachian child, or in many cases, simply a rural child in a relatively slow-moving rural community, needs the special attention to his particular set of problems and in this context, this is one of the purposes or intents of the ungraded pattern. Beyond that, excepting fulfillment of the general skills patterns of the elementary education, the person needs an opportunity to develop some kind of specifically saleable skill. Something that he can use when he moves into society. In that sense the school program has to provide him this opportunity so that he doesn't argue the point of irrelevance of the school program, but sees on the contrary, what opportunity he has is particularly relevant to what he wants to do, or [72] may be able to find to do in his community.

Q. Is a special effort required by locality and school officials to provide such system, in your opinion? A. Yes, special effort. There are two kinds of high level support and a particular orientation on the part of the public and the school officials to meet each child in this way.

Q. Have you studied the existing systems in Greenville County sufficiently to have formed an opinion as to whether it is providing this special effort in support necessary to the system that you have described? A. Well, my study was not in sufficient detail so that I could oh, pursue it down to the most minute point, but there are several items that are important. The first is, that the school system has an average county school system, which means it is supported on the average level, it has approximately average pupil-teacher ratio. It has no special organization pattern that

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would help integration. It, has no special vocational programs that would help integration. It has a left-over as many school systems do, in agricultural programs that only does not help integration, but it doesn't help anybody else. Several things that have of this [73] nature, it has comparatively limited library facilities and the organizational pattern that now exists, is essentially inflexible and the consequence of that, is that the range of opportunity is limited for a child, say, operating in a single building in a sixth grade, only.

Q. Well, sir, you are now alluding to the plan under which the County is operating, the so-called pairing plan, is that correct? A. (No response)

Q. That, of course, is part of the organizational pattern of the schools? A. Yes, sir.

Q. Would you tell the Court your opinion, from an educational standpoint, of the so-called "pairing plan" that is in effect in Greenville County? A. Well, if we start from the point of pairing, as such, I think we would have to say that Greenville County doesn't have a precisely, a pairing plan. That usually implies you have one school which has been predominantly for Negro and one school predominantly for White, and you now put them together and divide the population approximately in half, by grade levels. The Greenville County organization has, in effect, taken all of the students and then have allotted them in the [74] without regard to race or place of residence. Now, the effect of either of these, in the elementary school where it is particularly important with where it is most often used, is to divide the elementary school as a totality K through 5, K through 6, 7.

Q. By K, you mean, Kindergarten? A. Kindergarten, yes, or One through 6, 7 or 8, into two or more levels. Now,

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what that does, usually, is to place both the teaching and the resources of support teachers, the text materials, the library materials, the various supplementary instructions or instructional materials of a variety of kind on that limited level, but the children, in any given grade, have an instructional, well, I shouldn't say instructional, have an achievement range of about double the number of years as the grade designation, for instance, as you will ordinarily find in a group in the third grade, classified basically, according to age, having achievement level all the way from first grade on through to the sixth grade. You will find students in the fifth grade having an achievement level of all the way from the late first grade on through to about the tenth grade. When you shorten the range of resources to that group, you apply the resources primarily to the center of [75] the group, and you ignore either end. Greensville County is currently moving to try to reorganize this library system and it is reorganizing its libraries according to the plan that is in effect. That is in the elementary school, which is grades 1, 2, 3, it is going to put materials, primarily 1, 2, 3 and in the school, in the next school up the line, grades 3, 4 or 4, 5, I beg your pardon, is going to put materials, primarily grades 4 and 5 and this kind of thing means that if children remain basically classified by age, that in any one of these schools, the range of materials and consequently the range of instructional and independent opportunities available will be shortened for them.

Q. With what effect? A: Well, with the basic effect, opposite to that which I initially said was desirable. I said that it is desirable to be tried to provide for each child an instructional program as close to his next step in achievement as possible. If his achievement level is comparatively high for the age classification and the materials and the in-

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instructional resources are shortened, this can't be provided. Correspondingly, if achievement level is substantially at a low level, relative to his age classification and the [76] instructional material apply for shortened, then the student doesn't exist, or is reduced.

Q. Does the pairing plan have any adverse economic effect on the operation of the school system? A. Well, ordinarily, it, the item of transportation is implied and if the school system does not add to its budget in order to overcome the transportation problem, then this money will have to be taken from some other resource, that is within the budget. Otherwise,—furthermore, it implies, as transportation does, and if it is a fairly long time from the time the child is required to leave home until he gets back, much of this time on the bus, or waiting for the bus, has no useful educational purpose, and the consequences of course, are that it is essentially wasted time and energy on the part of the children. If the school system were inclined to do so, going back to these instructional resources, it might, within a given grade group, say one through three, provide the necessary range of instructional resources, but if this does not appear in the budget, then an assumption is that it has not been provided and it requires an extra effort to provide this.

Q. Then you found no such error in the present budget? [77] A. No, the Greenville budget is an increase of approximately \$20.00 per year, per child, for 1969 and 1970, over the operating budget for 1968-1969. This won't keep up with inflation, but, let alone add any kind of services. As a matter of fact, looking at the budget, it appears that certain services that were provided, are not now being provided and some monies have been transferred from various kinds of programs into the, particularly the transportation program, at this time.

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Q. Was there an increase in the transportation budget in 1969-1970 over that of the preceding year? A. Yes, sir, there is a basically, \$10,000.00 increase in the budget in the past four years; transportation costs have gone up from \$81,708, approximately \$3,100.00, \$89,700 and now to \$102,300.00 for this year. This is an estimate based upon the school system's figures.

Q. Now, sir, have you studied the plan and estimated budget prepared by Dr. Willett for the City of Emporia, which has been approved insofar as possible, for the next school year? A. Yes, I have looked at this budget and considered and secured the budget message.

Q. Would you—I would ask you if you have an opinion and [78] if so, would you tell us what your opinion is, with respect to whether this system, as proposed by the City, provides, or has the potential for providing the educational solutions that you previously referred to? A. Well, two things are involved in this. One is the basic change and organization and the other is the budget itself. The budget has explicit provision for attracting teachers who, in terms of the budget message, would be effective in both the ungraded primary and team teaching pattern. It has the addition of Kindergarten and it has by relief to some degree, a lesser proportion total budget indicated to the transportation, it has the addition of the health services, it has the addition of the certain County services. This does not say the County has some of these, but the budget provides for more proportionately of these services to each child. It has a provision not in specific, but in general terms, for a lower pupil-teacher ratio and a higher per pupil cost, in the undergrades, to permit an effective vocational program, than the vocational program now currently defines, I would say, as a general statement, that the intent, underlying this

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budget, is entirely supportive of the basic original [79] points on, well, good education for everybody, not simply the, with the integration, but a good opportunity for everyone.

Q. Will you, sir, explain to the Court, just what the concept team teaching embraces and how it works? A. Team teaching is, well, unfortunately, has several definitions, depending on who happens to be claiming it, at the moment. But in the idea sense, or the rationale for team teaching, you have seen the idea that a group of teachers each will take the responsibility before a group, usually, of upper elementary aged students. Now, the group of teachers consists of the group of four or five and the students then associated with this, would be the pupil-teacher ratio, in a group of, say 100 to 125 pupils. Now, the teachers are expected to, and provide time for planning for the educational program for these students. Then, in terms of what they perceive to be the necessary educational response to the conditions of these children, that is their achievement level and so they sub-divide the group to provide their instruction, or, they provide opportunity for students who are in need of individualized instruction for that, or in need of independent study for that, or they provide for opportunity for the group [80] to meet as an entity, as to an entirety for certain instructional situations. The argument about team teaching is that the team of teachers, because of the inter-relationships that they develop, can plan more effectively than one one teacher for the group involved. That, second, the team consists of persons who have different kinds of specializations, different kinds of talents and that then they may be used in the area of their foremost and greatest effectiveness and finally, that the group, as a group, is flexible in its changing sub-divisions

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and nature so that it may be most effectively taught, more effectively taught in any one of these.

Q. Is it true that a person in one of these non-graded, I used the word "team-teaching," but I guess it is a combination of non-graded system; it doesn't say I am in the first grade, or the second grade or the third grade, but it says I am in the primary grade? Basically, is that how it works, or is that an oversimplification of it? A. It is not quite an over-simplification, it is probably a goal. It is one not yet achieved, because we have a provision for tri-grade levels, but to switch from team teaching to the ungraded level. Now, they have much the same connotation as the group of students [81] who will be assigned to a group of teachers. The teachers will then be provided planning time, resources—the broad range of resources and so on so that they may sub-divide this group, or treat it as a whole when the occasion demands. In the ungraded primary, the idea is that each child is progressing at his own rate of achievement. This obviously requires that this rate of achievement be assessed regularly. There are as many school systems that have set up to operate this assessment on a weekly basis; this seems not to take advantage of the teacher's capability for adapting to the situation, so, probably, on a bi-weekly, or monthly basis, reassessment occurs. The progress rate of the child is determined and in a reorganization within the basic group, if it is required, then this is permitted, or, it is, within the realm of possibility. It involves the idea that teachers teach, will teach what is necessary to whomever needs it within this total age range. That each child is going through a progressive pattern leading to a competency that will permit him to enter the next grade level which is different. Usually the fourth grade then. Then it has no

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connotation for prior classification. In the sense of, say, an intelligence test, or last [82] year's achievement test, or some such thing as this, except that at some early time, some kind of assessment must be made in order that the teachers respond to the child's particular educational success. In other words, a child may be strong in mathematics and not have to be held back at all, but be weak in English and have to be in a different subject group for that.

Q. I see, he may not have to be held back for that one subject, is that it? A. Yes.

Q. Correct? A. In the case of a child in that situation, he might be progressing at what you might classify as normally in one area, and slower in another and more rapidly in another. Most people have achievement profiles, and while it is, as a matter of fact, the case of an extremely able student who is probably doing fairly well in everything and an extremely poor student is probably not doing very well in anything. For the greater portion of the people, there is a profile, that for a young lady, for example, this is partially culturally determined, of course, she will be doing quite well in reading and literature and relatively poorly in mathematics.

[83] Q. And this provides a means by which she can get special attention and instruction that she is weak in?

A. Basically the whole argument is that it provides a means by which the student gets help where he needs it, at great freedom to move independently when he doesn't need help.

Q. And this is a—state whether or not this is an educational device that is used in all schools whether they are all in the same race or segregated or integrated? A. Yes, it started out, well, first defined by the California education professor by the name of John Goodland and it has

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spread, the ungraded primary has spread all the way across the United States in all kinds of schools, with the possible exception that schools in more traditional areas have not adopted this pattern very rapidly. High schools with poor support levels who could not give the teacher the extra time or the support system, have not adopted this pattern and in general, rural schools have been less willing to adopt it than city schools.

Q. Now, does the budget, estimated budget and budget message and plan, proposed by the City of Emporia, provide what you consider to be the necessary support to effectuate these programs that you have [84] mentioned?

A. Well, as the budget is now constituted, it has specific provisions for these items and it is argued, of course, if the City continues this orientation, it should be able to fulfill this program demands.

Q. And if Emporia does what it has contemplated it is to do, in your opinion, will its system be superior to the existing system in Greensville County? A. Yes, this doesn't deny Greensville from doing this, or that they could do this, but it would be substantially superior.

Q. Will it, in your opinion, provide the programs that are necessary and desirable to make a unitary system work in the true sense of the word, work, in your opinion? A. Yes, providing programs that are good and the budget, as it is currently constructed, indicates that the attitude, a good attitude on the part of the people involved is good, it does exist, and if again continued, will be able to provide those programs. It is basically a matter of intent to concern ourselves about the child and not about his color.

Q. All right sir, the Court has expressed concern as to the effect of the separation of the City of Emporia, from the school system that it is presently a part [85] of, and

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specifically, the effect on the remaining system. Would you care to, or would you express your opinion to as far as you can, as to what that effect might be? A. Well, there are about four effects that seem important at the moment and some others that are dependent upon either a change or a continuing of the condition. First, the effect will be to reduce the number of separate school entities for the Greenville organization. Which should permit Greenville to function a little more effectively on the school organization and on transportation. I don't know that it will, but it should permit this. The effect on, in one sense, might be to provide to Greenville, an opportunity to watch Emporia to see if it in fact does what it is claiming to do and therefore, emulate it. This is largely contingent upon Greenville's willingness to build a budget similar to that of Emporia.

Q. Do you know of their intent to do so? A. No, I have no knowledge of such an intent. I was listing the questions about teachers and so on and I would suppose that the two school systems existing side by side, would be in some competition for teachers. However, Greenville will have teachers that it has no use for. That is, cannot employ, [86] in terms of the remainder of the school system and some of these might well wish to move to Emporia and probably actually live there, because it is not the case of very few teachers who function in the County Schools, actually live outside of your barn or suburban areas, they live in the urban area and, of course, these schools are all right surrounding the urban areas so the chance is good that most of the teachers in Greenville County do live in Emporia. If Greenville teachers are seeking positions, and Emporia offers more money, and the Greenville teachers are qualified, there is a possible

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effect of training over the better teachers from Greenville, by putting them in Emporia. I would presume that this could be specifically overcome in one of two or three ways and I would also presume that the teachers in the Greenville County System, at this time, might not be oriented to or meet the qualifications desired in terms of team teaching and ungraded primary that Emporia is trying to get in its teaching staff. Basically, I would think that would be about the set of effects that I could discern.

Q. Do you know what the effects on the educational process would be in the County, because of an increase of, [87] in the ratio of Negro to White children of 70-30, as compared to the existing 60-40? A. I don't know. I specifically spent some time examining the information to find out if any studies had been made that dealt with particular educational effects associated with particular proportions of Negroes and Whites in the schools systems and no real information exists that I know of that deals with this kind of explicit question. As to whether it would make a difference if it is 50-50, 45-55, 40-60 or what have you.

Q. To your knowledge, no objection has been made, or, has anybody made a study that would lead to any conclusions on that question? A. (Nodded head negatively.)

Q. Thank you, sir. No study has been made? A. No study has been made and I would not conjecture.

Examination by Mr. Tucker:

Q. Doctor Tracey, to move to the other extreme of the public educational system, when you talk about high schools, what is your opinion as to the advantages of a, of having larger high schools, as against smaller high schools? I mean, so far as numbers of children are concerned? A.

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Well, there are two or three basic advantages in increasing the size in high schools. The first [88] advantage is that if you offer, or wish to offer particular programs for particular groups, you will have a larger base group on which to operate. Now, let me make that a little more clear. Supposing you want to offer an instrumental music program involving a fair amount of individualized instruction and you want to offer this for the purpose of giving potential musicians a musical education in a given population. Only about 15 percent are potentially effective musicians so if the less population on which you could base this kind of thing would probably be a population of a hundred or so that would provide you with one class. If you talk only about fiddle players, you would have to have a population of much greater than that to provide you with one basic class of fiddle players. This would also apply to various other kinds of special interest patterns. On either end of the scale, whether this was special remediation or a talent development. Now, that is the major value of a large as opposed to a comparatively small school. However, to a degree and not completely, this kind of thing may be built in, to a school, if more money is provided and smaller pupil teacher ratios are accepted. What it amounts to is, that if you can get a population large enough so that 15 percent of the approximately, or 15 to 20% [89] provides a continuing instructional group and are willing to pay for the teachers for just 15 students. You have the same basic advantage, if you are willing to pay the teachers, you don't get the advantage until you have enough flexibility in the large school to assign a teacher.

Q. Over the years, I have heard all kinds of answers from educators as to what they consider an ideal size for high schools. What figure, in your estimation, makes or

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approaches the ideal size for a high school? A. All right, I understand why you have heard all of these figures, because in the first place, they tend to change over the times. A few years ago, actually in the 1930's, when most high schools were exceedingly small.—

The Court: Excuse me, Mr. Tracey, let's answer the question directly, if you will please; just tell us your idea of an ideal size of a high school.

A. All right, I think that for the maximum flexibility, and the less loss of, of identity on the part of the individual children, that a high school probably should be in the 1200-1500 range. That is the optimum that is not maximum or minimum; it is the optimum.

[90] Q. And the senior class of that high school, would probably be, about how many? A. Well, this senior class is going to have to be some place in the neighborhood in that setting, of 500, if it is a 10-12 school, or, going on down the line, since the high school might be organized on a 7 through 12 basis, to about 150.

The Court: Again that is optimum?

A. Yes, again, that is the optimum, in the center of the original figure that you asked me for, because, a high school, if you follow me, a high school is not a fixed set of grades. There are Senior High Schools; four-year high schools; five-year high schools and six-year high schools.

Q. All right, four-year high school in that setting, would have a senior class of about 300.

Q. And a five-year high school would be? A. About 500.

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Q. About 500? A. Less than 500, 500, well, actually about 400 and something, considering the attrition over the three grades.

Q. Now, in your studying of it, did you give thought to—strike that. Did you give consideration to a better [91] organization of the entire school system? I mean, with the County and the City being in one school system?

A. Not in the sense that I have studied it carefully enough to know what I would propose as an organization, in the sense that if I were to propose an organization, it would consist at least of elementary schools operating K through 5, or K through 6. Now, however, those attendant areas were—I don't know if they were considered or not. I do not know, because that is the part I haven't examined. I don't accept the idea of fragments of the elementary pattern.

Q. All right, I recall your testimony that a child needs contact with the entire range of society, rather than being separated and one of the illustrations you pointed out was that of the rural child in the slow-moving rural communities? A. Yes.

Q. Now, let's project that the people of this area involved desired and were allowed that if the City of Emporia became a school system and the County became another school system, would that not diminish the range of society to which the rural child would be exposed?

A. I think I would have to say that it would, and, we will just leave it at that.

[92] Q. In other words, you are aware that you could not help but notice that Emporia is the mercantile center of the cement business in the center of the county and that it is essentially rural? A. That's right.

Q. If we take the isolated,—If we isolate the City

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children we will actually be taking away from the rural children valuable contacts that they should be connected to? A. You would take some part of the range away.

Q. Yes, as an educator, and if you had the job to desegregate or organize the two systems, rather than having the job to organize one system, that is, organizing the combined system, which alternative would offer you the better opportunity of doing the better job? A. This is dependent upon a prior condition. This is dependent upon the basic willingness of the system to support and the willingness of Greenville system to support it apparently has been deteriorating in terms of its budget figures. If we could assume that Greenville County would move its support level up to the point where it would provide these programs, then I would be arguing for the entire system. But, you cannot now, that is the important part.

Q. Did you make any study to determine if there was any [93] basic difference between the people who live within the City of Emporia and those who live outside of the City of Emporia in the County, any basic differences in their attitudes? A. No.

Q. You are not prepared to say that the people are any different in their basic attitude than the people within the City will give support to people without the City, will without support if their leaders are demanding it? A. No.

Q. All right.

Mr. Gray: Your Honor, may I have one, I one moment to ask a question I think I may have to ask the Doctor?

The Court: Yes, certainly.

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Mr. Gray: Dr. Tracey, you have several times spoken of willingness to up the budget?

A. That's correct.

Mr. Gray: Meet the needs, as the ability to up the budget also important. The wealth of the citizens, is that important, too?

A. This is important, but it is basically the case that in the southeast Virginia included and south side Virginia including that level of effort which is the amount of money per capita as related to per capita [94] income, is only at the average or below average for the United States.

Q. Did you make any studies in Greenville County, exclusive of Emporia, as to the ability of the economic state or status, in the— A. No.

Q. So, you have no knowledge of this ability? A. No.

Mr. Gray: Thank you.

Mr. Kay: No questions.

The Court: Thank you, Doctor, you may be excused.

(The witness, having been excused, withdrew from the stand.)

George F. Lee—for Defendants—Direct

GEORGE F. LEE, having been called as a witness, was duly sworn by the Clerk, and testified on his oath, as follows:

Direct Examination by Mr. Warriner:

Q. Mr. Lee, you have been previously identified as being George F. Lee, Mayor of the City of Emporia? A. Yes, sir.

Q. Your age place, and your place of residence are already in the record? A. (Nodded head)

Q. Preliminarily, Mr. Lee, I hand you a sheet of paper and ask you if you recognize them? [95] A. Yes, sir.

Q. What is the paper? A. This is a letter from your firm.

Q. To whom? A. To the City of Emporia and myself, specifically.

Q. What is the date on it? A. July 18, 1969.

Mr. Tucker: No objections.

Q. What is this letter? It speaks for itself but I would like to put this letter in evidence; it has to show, if Your Honor please, it has to do, with the contract, dated July 18, 1969.

(Defendant's Exhibit E-J, marked for identification)

Q. Mr. Lee, under your leadership and that of the City Council of Emporia, has a budget and a plan for the operation of the City schools, along the lines proposed by Mr. Willet, approved by the City School Board, been adopted? A. Yes, sir.

Q. When was it adopted? A. It was adopted at a meeting two weeks ago, I believe.

George F. Lee—for Defendants—Direct

Q. This was the first meeting held of the formulation of this budget? A. Yes, sir.

Q. Now, Mr. Lee, you have heard the testimony here today [96] about the problems with respect to a County School system needing and meeting and overcoming the challenge of a unitary school system. Are you a life-long resident of Greenville County and Emporia? A. Well, I came there in 1938.

Q. Where did you come from? A. From 15 miles away. South Hampton.

Q. Are you familiar with the leadership, present leadership of Greenville County? A. Very much so.

Q. Does Greenville County—

Mr. Marsh: Excuse me, Your Honor, we want to object. This testimony was gone over very thoroughly in the first hearing. We don't think it adds anything, it is part of the evidence in the case already, these very questions were asked.

The Court: I think so. Try not to repeat.

Mr. Warriner: I will limit it to one more question, Your Honor.

Q. In your opinion, will the present leadership of Greenville County adequately support a school system which will bring about a working unitary school system? A. In my opinion,—

The Court: Just a moment.

Mr. Tucker: I am just wondering what [97] the basis of opinion, whether that is a matter for his opinion, the Court, or anybody else.

George F. Lee—for Defendants—Direct

The Court: That may go to the weight of it.

Q. Very well.

The Court: Objection over-ruled. You don't think they can do it?

A. No, sir.

Mr. Warriner: I will develop the weight of it, if Your Honor Please. How long have you been Mayor?

A. More than ten years.

Q. Before that, did you serve on the City Council? A. Yes, sir.

Q. Are you engaged—

The Court: Let me get it straight. You think they can't do it or you think they don't want to do it?

A. I think they are willing to do it. I know they have the financial background to do it, if they would.

Q. How long did you serve on the City Council? A. Four years.

Q. Are you a business man in that area? A. Yes, sir.

Q. Up until 1967, were you a resident of the County of [98] Greenville? A. Yes, sir.

Q. Have you had in your official capacity and in your private capacity, had dealings with the Board of Supervisors of Greenville County? A. Yes, sir.

Q. Do you know each of them officially and personally?

A. Yes, sir.

George F. Lee—for Defendants—Direct

Q. Do you know how long they have been serving on the Board of Supervisors? A. Yes, sir.

Q. Have they been elected and reelected? A. Yes, sir.

Q. Do you have confidence, based upon your experience with these people? I have that question, I think I have given some background as to how he can form an opinion. Now, are you also familiar with the leadership of the City? A. Yes, sir.

Q. How long have you been associated with the—with that leadership?

The Court: All of his life.

A. Yes, sir. Ever since I moved from Adams Grove.

Q. Even since you moved from Adams Grove?

The Court: I understood he was the leader.

[99] Q. Is that correct? Do you believe that the leadership of the City of Emporia has the will to make a unitary school system work? A. Absolutely.

Q. What, in your opinion, would be the alternative to an independent school system for the City of Emporia? A. Your Honor, may I elaborate just a bit?

The Court: All right, sir.

A. Last year, after we left your Court and we went back home and I was determined and the members—

Q. Excuse me, Mr. Lee, it may seem like last year, it was last summer. A. Last summer, I was determined to follow your instructions by the letter of your instructions and your instructions certainly have nothing to do with any systems other than the systems you have outlined.

George F. Lee—for Defendants—Direct

However an upsurge came for a private school system. On the quietus, I did my best to insure the citizens of Emporia that they are the only people I deal with; don't jump into a thing like this. Let's give it an honest trial. And, our people in Emporia, by and large, have done this. However, they pulled out of the County systems as a whole and in wholesale lots and I am afraid that you are going to see so much of the exodus if we don't provide an equality for all of [100] our children. Let me say the ghettos are located in Emporia, the poor people are located in Emporia, the wealth of Emporia is not in Emporia, the wealth of our area is in Greensville County, not in the City. It would be an extra effort for the City to raise the money and we published a, in our paper, this was very bad politically, last week, that in order to support this system that we adopted, our taxes would have to be increased 30% next year. Our people will do it. We have less of the wealth in the County. Well, I am afraid our children will not have, in effect, all our children, will not have an effective public school system, because next year, this year was bad, so as far as interest, I am afraid my influence will not hold them in next year. We are going to see a degrading County or public school system and this is the last thing I want to see.

Q. No further questions.

The Court: Any cross-examination?

Mr. Tucker: No questions.

The Court: Thank you, Mr. Lee.

(The witness, having been excused, withdrew from the stand.)

Mr. Warriner: Defendant City, rests.

George F. Lee—for Defendants—Direct

The Court: The Defendant County, have any evidence to put on?

Mr. Gray: No evidence.

[101] The Court: Does the Plaintiff have any rebuttal?

Mr. Tucker: Nothing further.

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[Filed March 2, 1970]

MERHIGE, District Judge.

The plaintiffs in this action filed a supplemental complaint on August 1, 1969, alleging that the added defendants, the City Council and the School Board of the City of Emporia, had taken steps to establish a city school system independent of the Greenville County system, then under a desegregation order in this suit. Emporia, a city of the second class since 1967, is surrounded by Greenville County. Through the school year 1968-69 public school pupils resident in Emporia had attended schools operated by Greenville County; the city had been reimbursing the county for this service under a contract of April 10, 1968.

On August 8, 1969, the added defendants were temporarily enjoined by this Court from any steps which would impede the implementation of the outstanding desegregation order. Subsequently the Emporia officials answered, denying the allegation that the plan for separation would frustrate the efforts of the Greenville County School Board to implement the plan embraced by the Court's order. The matter was then continued until December 18, 1969, for a hearing on whether the injunction should be made permanent.

The original action seeking relief from alleged racial discrimination in the operation of the Greenville County School System, was filed in March of 1965. Emporia was not a city under Virginia law until July 31, 1967; until that time the county was alone responsible for the public education of those within its borders. Under the contract of April 10, 1968, the county continued this service in exchange for the payment of 34.26% of the cost of the system.

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On June 21, 1968, the plaintiffs moved for additional relief. Up to that point the county-administered system had operated under a free-choice plan which, plaintiffs asserted, had not achieved constitutional compliance under *Green v. County School Board of New Kent County*, 391 U.S. 480, 88 S.Ct. 1969, 20 L.Ed.2d 716 (1968). The 1967-68 enrollment figures show the racial distribution then prevailing:

<i>School</i>	<i>Students</i>		<i>Faculty</i>	
	<i>W</i>	<i>N</i>	<i>W</i>	<i>N</i>
Greensville County High	719	50	39½	1
Emporia Elementary	857	46	34½	2
Wyatt High	0	809	4½	32½
Moton Elementary	0	552	0	22½
Zion Elementary	0	255	1	12½
Belfield Elementary	0	419	3	14
Greensville County Training	0	439	0	16

The two schools then attended by all the white students were and still are in the city of Emporia, as is the training school; others are in the county.

The county proposed the extension of the free choice plan for another year while a zoning or pairing plan was developed. The plaintiffs took exception. The Court ordered the county to file a pupil desegregation plan bringing the system into compliance with *Green* by January 20, 1969. The county again proposed that the free choice plan be retained with certain changes, principally involving transfers out of a pupil's regular school for special classes and faculty reassignment. As an alternative, if the first proposal were rejected, the county suggested a plan under which the high school population would be divided between the two facilities on the basis of curriculum pursued, academic or vocational. Faculties would be reassigned to achieve at least a

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75%-25% ratio in each school. Elementary school desegregation would be achieved by the transfer of individual Negroes to white schools "on the basis of standardized testing of all students."

The plaintiffs suggested the assignment of all students on the basis of grades attained to specific schools; pairing, in other words, the entire system. Elementary teachers were to follow their classes as reassigned, and high school teachers were to be shifted so that the racial balance in the Wyatt School and Greenville County High would be approximately the same.

A hearing was held on June 17, 1969, and this Court stated its findings and indicated its intention to order that the plaintiffs' plan be adopted.

By order of June 25, 1969, this Court rejected the defendants' proposals and ordered the plaintiffs' plan put into effect. Subsequently the plan was modified slightly on defendants' motion; the pupil assignments ordered on July 30, 1969, were as follows:

<i>School</i>	<i>Grades</i>
Greenville County High	10, 11, 12
Junior High (Wyatt)	8, 9
Zion Elementary	7
Belfield Elementary	5, 6
Moton Elementary	4, 5
Emporia Elementary	1, 2, 3
Greenville County Training	Special Education

On July 9, 1969, the city council met especially to formulate plans for a city school system. On July 10th the mayor sought the cooperation of county officials in selling or leasing school facilities located in Emporia. On July 14th the council instructed the city school board to take steps to create a city school division. On July 23rd the council

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requested the state board of education to authorize the establishment of such a division, which request has been tabled by the State Board "in light of matters pending in the federal court," defendants' Ex. E-1. The Emporia school board in the meantime advised the county officials that the contract would no longer be honored and that city pupils would not attend the county system in the forthcoming school year. A notice of July 31, 1969, published by the city school board, required that school age children resident in Emporia be registered and invited applications from non-residents on a tuition basis. The injunction of August 8, 1969, however, resulted in a continuation of city pupils attending the county system for the present school year.

At a hearing on December 18, 1969, the city took the position that the contract was void under state law (see defendants' Ex. E-J); this question is the subject of pending litigation brought by the city on October 1, 1969, in the state courts. The evidence shows that the city on September 30, 1969, notified the county of its view that the contract is invalid and its intention to terminate the contract under its terms, in any case, effective in July, 1971. Payments, however, were continued through the date of the December hearing. Emporia officials also have assured the Court that they have no intention of entertaining applications from nonresidents until so permitted by this Court.

At the hearing the county, unfortunately, took no position.

A resolution of the city school board of December 10, 1969, defendants' Ex. E-F, outlines the city's plan. Elementary levels through grade six would be conducted in the Emporia Elementary School building; grades seven through twelve would be housed in the Greensville County High School. Defendants' Ex. E-G includes budgetary

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projections for the new system. The city projects enrollment figures for the system at about ten percent above the number of city residents now in the public system "on the expectation that some pupils now attending other schools would return to a city-operated school system," defendants' Ex. E-F, at 1.

The city clearly contemplates a superior quality educational program. It is anticipated that the cost will be such as to require higher tax payments by city residents. A kindergarten program, ungraded primary levels, health services, adult education, and a low pupil-teacher ratio are included in the plan, defendants' Ex. E-G, at 7, 8.

The county has filed, at the Court's request, a statistical breakdown of the students and faculty in the county-administered schools, now in operation under this Court's order of July 30, 1969. The table below shows the current racial makeup of the seven schools:

<i>School</i>	<i>Students</i>		<i>Faculty</i>	
	<i>W</i>	<i>N</i>	<i>W</i>	<i>N</i>
Emporia Elementary Grades 1-3	283 30.1%	655 69.9%	17	18
Hicksford (Moton) Grades 4-5	238 37%	405 63%	11	13
Belfield Grade 6	107 30.6%	243 69.4%	7	11
Zion Grade 7	127 34.8%	238 65.2%	7	7
Junior High Grades 8-9	215 32.6%	443 67.4%	19	21
Senior High Grades 10-12	346 44.9%	424 55.1%	31	14
Training School	10 13.7%	63 86.3%	1	8

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By comparison, the county reported the following racial characteristics for the 1968-69 school year:

<i>School</i>	<i>Students</i>		<i>Faculty</i>	
	<i>W</i>	<i>N</i>	<i>W</i>	<i>N</i>
Greensville County High	720	45	39	1
Wyatt H.S. (present Jr, High)	0	829	5	34
Emporia Elementary	771	53	33	3
Moton (present Hicksford)	0	521	5	18
Zion	0	248	1	13
Greensville County Training	0	387	0	17
Belfield	0	427	2	16

The procedural status of the case at present needs clarification. The plaintiffs contend that no one has made application to this Court that its order of June 25, as modified on July 30, be amended. This is the outstanding desegregation order addressed to "the defendants herein, their successors, agents, and employees." They contend that this Court is therefore limited to the inquiry whether the city officials threaten to interfere with the implementation of the order and therefore should be permanently enjoined.

Some passages in the city officials' briefs support this contention. In their rebuttal brief they state that the city is not seeking any sort of judicial relief excepting that the injunction of August 8, 1969, be lifted. They contend that any change in the existing desegregation order would be "a matter to be resolved by the Court, the plaintiffs and Greensville County, and would not involve the city." [Rebuttal brief of January 23, at 3.] Such a position, however, is inconsistent with that taken by counsel at the December 18th hearing. Issues explored went beyond the question whether the city's initiation of its own system would necessarily clash with the administration of the

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existing pairing plan; indeed there seems to be no real dispute that this is so. The parties went on to litigate the merits of the city's plan, developing the facts in detail with the help of an expert educator. Counsel for the city stated that "at the conclusion of the evidence today, we will ask Your Honor to approve the assignment plan for the 1970-71 school year and to dissolve the injunction now, against the city, effective at the end of this school year," Tr., Dec. 18, at 11.

It seems clear that the supplemental complaint sought to join the city officials not so much as successors, in full or in part, to the official powers and interests of the original defendants, but rather as persons who intended to use state powers to interfere with the plaintiffs' enjoyment of their constitutional right to unsegregated public education. Ample precedent exists for authority to grant relief in such a case. *Faubus v. United States*, 254 F.2d 797 (8th Cir., 1958); *Lee v. Macon County Board of Education*, 231 F.Supp. 743 (M.D.Ala. 1964). Indeed such orders have issued against private parties, on occasion, even at the instance of state officials, *Kasper v. Brittain*, 245 F.2d 92 (6th Cir. 1957); *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956). Plaintiffs did not specifically request then or since that the city officials be joined or substituted as parties defendant pursuant to Fed. Rules Civ. Proc., Rule 25(c), or Rule 25(d), 28 U.S.C.

Nevertheless, this Court has concluded that the plaintiffs' failure to so move was, under the circumstances, excusable and indeed unnecessary. The city defendants, by their actions, have made it clear that, according to state law, they have succeeded to the powers of the county board members over public school students resident in the city. They now desire to exercise these latent powers and have asked this Court to amend its orders to enable them to so do. A word about the Virginia education law aids in understanding this aspect of the case.

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When Emporia became a city the duty fell upon it to establish a school board to supervise public education in the city. §§ 22-2, 22-93, 22-97, Va.Code Ann., 1950. State law permits, however, the consolidation of a city with a county to form a single school division, with the approval of the State Board of Education, § 22-30, Va.Code Ann., 1950. In such a case a single school board may be established with the approval of both governmental units. § 22-100.2, Va.Code Ann., 1950; the individual boards would then cease to exist, § 22-100.11, Va.Code Ann., 1950. Alternatively, the two boards might remain in existence and meet jointly to choose a division superintendent, § 22-34, Va.Code Ann., 1950. There is provision as well for the establishment of jointly owned schools, § 22-7, Va.Code Ann., 1950. When a city contracts with a county for the provision of school services, moreover, there is specific provision that the county board shall include representatives of the city, § 22-99, Va.Code Ann., 1950. Therefore, once it became a city, there is no doubt that Emporia succeeded to the state-law powers and duties of actively administering public schools for its residents under one of these statutory schemes. It has not, however, until recently sought to exercise that power. Only after the June order did the city move to assume the powers that it had, by contract, delegated to the county, plaintiffs' exhibit 12.

Under federal practice, an injunction may not issue against and bind all the world. The persons whose conduct is governable by court order are defined by rule:

Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by per-

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sonal service or otherwise. Fed. Rules Civ.Proc., Rule 65(d), 28 U.S.C.

This rule fixes the scope of valid orders, and terms in a decree exceeding the rule are of no effect, *Swetland v. Curry*, 188 F.2d 841 (6th Cir. 1951); *Alemite Mfg. Co. v. Staff*, 42 F.2d 832 (2d Cir. 1930); *Baltz v. The Fair*, 178 F.Supp. 691 (N.D. Ill. 1959); *Chisolm v. Caines*, 147 F.Supp. 188 (E.D.S.C. 1954). In general, only those acting in concert with, or aiding or abetting, a party can be held in contempt for violating a court order. One whose interest is independent of that of a party and who is not availed of as a mere device for circumventing a decree is not subject to such sanctions, *United Pharmacal Corp. v. United States*, 306 F.2d 515, 97 A.L.R.2d 485 (1st Cir. 1962). The law exposes to summary punishment only those who have already had their rights adjudicated in court. Consistent with these limitations, a court will only order a public official to perform or refrain from certain acts which are within the powers conferred upon him by law, *Bell v. School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963), and will deny relief when those parties before it are not fully empowered, under state law, to take the action requested, *Thaxton v. Vaughan*, 321 F.2d 474 (4th Cir. 1963).

Under these precedents one might conclude that, because the city officials were not parties to any of the proceedings in this case prior to the filing of the supplemental complaint, they are therefore not bound by decrees in that litigation. But a line of cases involving public officers has also evolved holding that a decree may bind one who succeeds to the powers exercised by the officer who was a party to the original suit. In *Regal Knitwear Co. v. N. L. R. B.*, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661 (1945), the Supreme Court recognized that a decree might bind "successors" to a private litigant, at least if they came within

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the usual "privity" doctrines. *Lucy v. Adams*, 224 F.Supp. 79 (N.D.Ala.1963), held that the successor to a state university dean of admissions was bound by a decree against his predecessor so long as he had notice of the injunction. In *Lankford v. Gelston*, 364 F.2d 197, 205 n. 9 (4th Cir. 1966), an injunction against a police official or his successor was expressly endorsed. The injunction of June 25, 1969, as mentioned above, issued against the county officials or their successors. No one contests that the city officers had notice of the decree. The Emporia officials in a very real sense appear now to have succeeded, under state law, to the part of the county officers' powers and thus are amenable to the decree.

It is irrelevant that the city officials hold positions that differ in name from those of the original parties. Substitution in analogous situations has been effectuated under Fed. Rules Civ. Proc. Rule 25(d) 28 U.S.C., when the relevant functions have been moved from one office to another. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S.Ct. 1129, 91 L.Ed. 1375 (1947); *Toshio Joji v. Clark*, 11 F.R.D. 253 (N.D.Cal.1951); *Porter v. American Distilling Co.*, 71 F.Supp. 483 (S.D.N.Y. 1947), cf. *Skolnick v. Parsons*, 397 F.2d 523 (7th Cir. 1968).

The city might have moved for substitution under Fed. Rules Civ. Proc., Rule 25(d), but its failure to do so is quite excusable. The county officials were under contract to operate the schools, and the question of the validity of that instrument was not raised. Greenville County officials were in possession of the schools whereas the city board was by all indications asserting no control. The county board, when ordered to take certain steps in the exercise of its power over the public school pupils of the city and the county, did not protest its lack of power. It may yet possess power over both city and county residents, at least for the term of the contract. But the city's actions subsequent to

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the pairing decree, and in particular the pending suit to declare the contract void, cast great doubt on the county's authority under state law. To all appearances the city board, but for and subject to the decree of this Court ordering non-interference, now has the power under state law to administer schools for the city residents. Certainly it must have such power, even if the contract is valid, commencing July 1, 1971.

As a successor in interest to a party to the original decree, it would seem that the city school board now has sufficient standing under Fed. Rules Civ. Proc., Rule 60(b), 28 U.S.C., to move to amend the outstanding decree. Those cases holding such relief to be unavailable to nonparties concern chiefly the applications of persons who did not have an interest in the judgment identical to that of the original party, *Mobay Chemical Co. v. Hudson Foam Plastics Corp.*, 277 F.Supp. 413 (S.D.N.Y. 1967); *United States v. 140.80 Acres of Land*, 32 F.R.D. 11 (E.D.La. 1963); *United States v. International Boxing Club*, 178 F.Supp. 469 (S.D.N.Y. 1959). The present standing of the city board members is still problematical because the validity of the contract has not been finally adjudicated. But it is clear that they will enjoy the relevant powers at least in the 1971-1972 school year, and sooner if they succeed in their litigation; this puts them in a position to move to modify the decree.

The Court therefore must proceed to the merits of the city's plan, treating the school board's application, as discussed above, as a motion under Fed. Rules Civ. Proc., Rule 60(b), 28 U.S.C.

The county board has provided data on the composition of the student body of each school as currently operated, broken down by race and by place of residence. The tables below are based upon that information:

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Overall System, September 1, 1969

Students by race and residence:

	<i>White</i>	<i>Negro</i>	<i>Total</i>	<i>% White</i>	<i>% Negro</i>
County:	728	1888	2616	27.8%	72.2%
City:	543	580	1123	48.3%	51.7%
Total	1282	2477	3759	34.1%	65.9% ¹

The establishment of separate systems would plainly cause a substantial shift in the racial balance. The two schools in the city, formerly all-white schools, would have about a 50-50 racial makeup, while the formerly all-Negro schools located in the county which, under the city's plan, would constitute the county system, would overall have about three Negro students to each white. As mentioned before, the city anticipates as well that a number of students would return to city system from private schools. These may be assumed to be white, and such returnees would accentuate the shift in proportions.

The city contemplates placing grades one through six in the Emporia Elementary School building. Such a school would have 314 Negro students and 270 white; 46.2% white and 53.8% Negro. A city high school incorporating grades seven through twelve would have 252 Negro students and 271 white; this would make for a ratio of 51.8% white to 48.2% Negro pupils.

¹ Figures secured from Greenville County school system; total students include 11 white and 9 Negro, who apparently reside outside both county and city.

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The impact of separation in the county would likewise be substantial. The distribution of county residents, by grade and race, is as follows:

	<i>White</i>	<i>Negro</i>
Grades 1-3	167—26.3%	468—73.7%
Grades 4-5	142—31.1%	314—68.9%
Grade 6	57—23.5%	185—76.5%
Grades 7-9	192—27.5%	506—72.5%
Grades 10-12	161—30.6%	365—69.4%

These figures should be compared with the current percentages reported by the county, given in a table above. At each level the proportion of white pupils falls by about four to seven percent; at the high school level the drop is much sharper still.

The motives of the city officials are, of course, mixed. Ever since Emporia became a city consideration has been given to the establishment of a separate city system. A second choice was some form of joint operating arrangement with the county, but this the county would not assent to. Only when served with an "ultimatum" in March of 1968, to the effect that city students would be denied access to county schools unless the city and county came to some agreement, was the contract of April 10, 1968, entered into. Not until June of 1969 was the city advised by counsel that the contract was, in all probability, void under state law. The city then took steps to have the contract declared void and in any event to terminate it as soon as possible.

Emporia's position, reduced to its utmost simplicity, was to the effect that the city leaders had come to the conclusion that the county officials, and in particular the board of supervisors, lacked the inclination to make the court-ordered unitary plan work. The city's evidence was to the effect that increased transportation expenditures would have to be

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made under the existing plan, and other additional costs would have to be incurred in order to preserve quality in the unitary system. The city's evidence, uncontradicted, was to the effect that the board of supervisors, in their opinion, would not be willing to provide the necessary funds.

While it is unfortunate that the county chose to take no position on the instant issue, the Court recognizes the city's evidence in this regard to be conclusions; and without in any way impugning the sincerity of the respective witnesses' conclusions, this Court is not willing to accept these conclusions as factual simply because they stand uncontradicted. Assuming *arguendo*, however, that the conclusions aforementioned are indeed valid, then it would appear that the Court ought to be extremely cautious before permitting any steps to be taken which would make the successful operation of the unitary plan even more unlikely.

The Court does find as a fact that the desire of the city leaders, coupled with their obvious leadership ability, is and will be an important facet in the successful operation of any court-ordered plan.

Dr. Tracey, a professor of education at Columbia University, felt that the county budget had not even been increased sufficiently to keep up with inflation in the 1969-1970 year, and that it seemed that certain cutbacks had been made in educational programs, mainly to pay for increased transportation costs. In Dr. Tracey's opinion the city's projected budget, including higher salaries for teachers, a lower pupil-teacher ratio, kindergarten, ungraded primary schooling, added health services, and vocational education, will provide a substantially superior school system. He stated that the smaller city system would not allow a high school of optimum size, however. Moreover, the division of the existing system would cut off county pupils from exposure to a somewhat more urban society. In his opinion as an educator, given community support for the programs he

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envisioned, it would be more desirable to apply them throughout the existing system than in the city alone.

While the city has represented to the Court that in the operation of any separate school system they would not seek to hire members of the teaching staff now teaching in the county schools, the Court does find as a fact that many of the system's school teachers live within the geographical boundaries of the city of Emporia. Any separate school system would undoubtedly have some effect on the teaching staffs of the present system.

Dr. Tracey testified that his studies concerning a possible separate system were conducted on the understanding that it was not the intent of the city people to "resegregate" or avoid integration. The Court finds that, in a sense, race was a factor in the city's decision to secede. This Court is satisfied that the city, if permitted, will operate its own system on a unitary basis. But this does not exclude the possibility that the act of division itself might have foreseeable consequences that this Court ought not to permit. Mr. Lankford, chairman of the city school board, stated:

Race, of course, affected the operation of the schools by the county, and I again say, I do not think, or we felt that the county was not capable of putting the monies in and the effort and the leadership into a system that would effectively make a unitary system work * * *, Tr.Dec. 18, at 28.

Mr. Lankford stated as well that city officials wanted a system which would attract residents of Emporia and "hold the people in public school education, rather than drive them into a private school * * *," Tr.Dec. 18, at 28.

Under *Monroe v. Board of Commissioners*, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968), and under principles derived from *Brown v. Board of Education*, 347 U.S.

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483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), federal courts cannot permit delay or modification in plans for the dismantling of dual school systems for the purpose of making the public system more palatable to some residents, in the hopes that their flight to private schools might be abated. The inevitable consequence of the withdrawal of the city from the existing system would be a substantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools. The county officials, according to testimony which they have permitted to stand un rebutted, do not embrace the court-ordered unitary plan with enthusiasm. If secession occurs now, some 1,888 Negro county residents must look to this system alone for their education, while it may be anticipated that the proportion of whites in county schools may drop as those who can register in private academies. This Court is most concerned about the possible adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs. This is not to say that the division of existing school administration areas, while under desegregation decree, is impermissible. But this Court must withhold approval "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system," *Monroe v. Board of Commissioners*, supra, 391 U.S. 459, 88 S.Ct. 1705. As a court of equity charged with the duty of continuing jurisdiction to the end that there is achieved a successful dismantling of a legally imposed dual system, this Court cannot approve the proposed change.

This Court's conclusion is buttressed by that of the district court in *Burleson v. County Board of Election Commissioners*, 308 F.Supp. 352 (E.D.Ark., Jan. 22, 1970). There, a section of a school district geographically separate from the main portion of the district and populated princi-

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pally by whites was enjoined from seceding while desegregation was in progress. The Court so ruled not principally because the section's withdrawal was unconstitutionally motivated, although the Court did find that the possibility of a lower Negro population in the schools was "a powerful selling point," *Burleson v. County Board of Election Commissioners*, supra, 308 F.Supp. 357. Rather, it held that separation was barred where the impact on the remaining students' right to attend fully integrated schools would be substantial, both due to the loss of financial support and the loss of a substantial proportion of white students. This is such a case.

If Emporia desires to operate a quality school system for city students, it may still be able to do so if it presents a plan not having such an impact upon the rest of the area now under order. The contractual arrangement is ended, or soon will be. Emporia may be able to arrive at a system of joint schools, within Virginia law, giving the city more control over the education its pupils receive. Perhaps, too, a separate system might be devised which does not so prejudice the prospects for unitary schools for county as well as city residents. This Court is not without the power to modify the outstanding decree, for good cause shown, if its prospective application seems inequitable.

Order of District Court**[filed March 2, 1970]**

For the reasons assigned in the memorandum of the Court this day filed, and deeming it proper so to do, it is **ADJUDGED and ORDERED**:

1. That the motion of the defendants, council of the City of Emporia and the members thereof, and the School Board of the City of Emporia and the members thereof, to dissolve the Court's injunction heretofore entered on August 8, 1969, be, and the same is hereby, denied, and deeming it proper so to do it is further **ADJUDGED, ORDERED and DECREED** that said order of August 8, 1969, shall remain in full force and effect until further order of this Court.

2. That the motion of the defendant School Board of the City of Emporia to modify the decree of this Court entered on June 25, 1969, as modified on July 30, 1969, be, and the same is hereby, denied.

Let the Clerk send copies of this order to all counsel of record.

/s/ **ROBERT R. MERHIGE, JR.**
United States District Judge

March 2, 1970.

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United States Court of Appeals for the Fourth Circuit

No. 14552

PECOLA ANNETTE WRIGHT, ET AL., APPELLEES

v.

COUNCIL OF THE CITY OF EMPORIA AND THE MEMBERS
THEREOF, AND SCHOOL BOARD OF THE CITY OF EMPORIA
AND THE MEMBERS THEREOF, APPELLANTS

Appeal from the United States District Court for the
Eastern District of Virginia, at Richmond

ROBERT R. MERHIGE, JR., District Judge

Argued October 8, 1970—Decided March 23, 1971

Before HAYNSWORTH, Chief Judge, BOREMAN, BRYAN,
WINTER, and CRAVEN, Circuit Judges sitting en
banc*

*John F. Kay, Jr., and D. Dortch Warriner (War-
riner, Outten, Slagle & Barrett; and Mays, Valentine,
Davenport & Moore on brief) for Appellants, and S.
W. Tucker (Henry L. Marsh, III, and Hill, Tucker
& Marsh; and Jack Greenberg, James M. Nabrit, III,
and Norman Chachkin on brief) for Appellees.*

CRAVEN, Circuit Judge: In this case and two
others now under submission en banc we must deter-
mine the extent of the power of state government to

*Judge Sobeloff did not participate. Judge Butzner disqualified
himself because he participated as a district judge in an earlier
stage of this case.

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redesign the geographic boundaries of school districts.¹ Ordinarily, it would seem to be plenary but in school districts with a history of racial segregation enforced through state action, close scrutiny is required to assure there has not been gerrymandering for the purpose of perpetuating invidious discrimination.

Each of these cases involve a county school district in which there is a substantial majority of black students out of which was carved a new school district comprised of a city or a city plus an area surrounding the city. In each case, the resident students of the new city unit are approximately 50 percent black and 50 percent white. In each case, the district court enjoined the establishment of the new school district. In this case, we reverse.

I

If legislation creating a new school district produces a shift in the racial balance which is great enough to support an inference that the purpose of the legislation is to perpetuate segregation, and the district judge draws the inference, the enactment falls under the Fourteenth Amendment and the establishment of such a new school district must be enjoined. See *Gomillion v. Lightfoot*, 364 U.S. 399 (1960). Cf. *Haney v. County Board of Education of Sevier County*, 410 F. 2d 920 (8th Cir. 1969); *Burleson v. County Board of Election Commissioners of Jefferson County*, 308 F. Supp. 352 (E.D. Ark.) aff'd — F. 2d —, No. 20228 (8th Cir. Nov. 18, 1970). But where the shift is merely a modification of the racial ratio rather than effective resegregation the problem becomes more difficult.

¹ The other two cases are *United States v. Scotland Neck City Board of Education*, — F. 2d —, Nos. 14929 and 14930 (4th Cir. —, 1971) and *Turner v. Littleton-Lake Gaston School District*, — F. 2d —, No. 14990 (4th Cir. —, 1971).

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The creation of new school districts may be desirable and/or necessary to promote the legitimate state interest of providing quality education for the state's children. The refusal to allow the creation of any new school districts where there is any change in the racial makeup of the school districts could seriously impair the state's ability to achieve this goal. At the same time, the history of school integration is replete with numerous examples of actions by state officials to impede the mandate of *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*). There is serious danger that the creation of new school districts may prove to be yet another method to obstruct the transition from racially separated school systems to school systems in which no child is denied the right to attend a school on the basis of race. Determining into which of these two categories a particular case fits requires a careful analysis of the facts of each case to discern the dominant purpose of boundary realignment. If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation. The test is much easier to state than it is to apply.

II

Emporia became a city of the so-called second class on July 31, 1967, pursuant to a statutory procedure established at least as early as 1892. See 3 Va. Code § 15.1-978 to -998 (1950); Acts of the Assembly 1891-92, ch. 595. Prior to that time it was an incorporated

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town and as such was part of Greenville County. At the time city status was attained Greenville County was operating public schools under a freedom of choice plan approved by the district court, and *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), invalidating freedom of choice unless it "worked," could not have been anticipated by Emporia, and indeed, was not envisioned by this court. *Bowman v. County School Board of Charles City County*, 382 F. 2d 326 (4th Cir. 1967). The record does not suggest that Emporia chose to become a city in order to prevent or diminish integration. Instead, the motivation appears to have been an unfair allocation of tax revenues by county officials.

One of the duties imposed on Emporia by the Virginia statutes as a city of the second class was to establish a school board to supervise the public education of the city's children. Under the Virginia statutes, Emporia had the option of operating its own school system or to work out one of a number of alternatives under which its children would continue to attend school jointly with the county children. Emporia considered operating a separate school system but decided it would not be practical to do so immediately at the time of its independence. There was an effort to work out some form of joint operation with the Greenville County schools in which decision making power would be shared. The county refused. Emporia finally signed a contract with the county on April 10, 1968, under which the city school children would attend schools operated by the Greenville County School Board in exchange for a percentage of the school system's operating cost. Emporia agreed to this form of operation only when given an ultimatum by the county in March 1968 that it would stop educating the city children mid-term unless some agreement was reached.

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At the same time that the county was engaged in its controversy with Emporia about the means of educating the city children, the county was also engaged in a controversy over the elimination of racial segregation in the county schools. Until sometime in 1968, Greenville County operated under a freedom of choice plan. At that time the plaintiffs in this action successfully urged upon the district court that the freedom of choice plan did not operate to disestablish the previously existing dual school system and thus was inadequate under *Green v. County School Board of New Kent County, supra*. After considering various alternatives, the district court, in an order dated June 25, 1969, paired all the schools in Greenville County.

Also in June 1969, Emporia was notified for the first time by counsel that in all probability its contract with the county for the education of the city children was void under state law. The city then filed an action in the state courts to have the contract declared void and notified the county that it was ending its contractual relationship forthwith. Parents of city school children were notified that their children would attend a city school system. On August 1, 1969, the plaintiffs filed a supplemental complaint seeking an injunction against the City Council and the City School Board to prevent the establishment of a separate school district. A preliminary injunction against the operation of a separate system was issued on August 8, 1969. The temporary injunction was made permanent on March 3, 1969.²

The Emporia city unit would not be a white island in an otherwise heavily black county. In fact, even in

² The decision of the court below is reported as *Wright v. County School Board of Greenville County*, 309 F. Supp. 671 (E.D. Va. 1970).

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Emporia there will be a majority of black students in the public schools, 52 percent black to 48 percent white. Under the plan presented by Emporia to the district court, all of the students living within the city boundaries would attend a single high school and a single grade school. At the high school there would be a slight white majority, 48 percent black and 52 percent white, while in the grade school there would be a slight black majority, 54 percent black and 46 percent white. The city limits of Emporia provide a natural geographic boundary for a school district.

The student population of the Greenville County School District without the separation of the city unit is 66 percent black and 34 percent white. The students remaining in the geographic jurisdiction of the county unit after the separation would be 72 percent black and 28 percent white. Thus, the separation of the Emporia students would create a shift of the racial balance in the remaining county unit of 6 percent. Regardless of whether the city students attend a separate school system, there will be a substantial majority of black students in the county system.

Not only does the effect of the separation not demonstrate that the primary purpose of the separation was to perpetuate segregation, but there is strong evidence to the contrary. Indeed, the district court found that Emporia officials had other purposes in mind. Emporia hired Dr. Neil H. Tracey, a professor of education at the University of North Carolina, to evaluate the plan adopted by the district court for Greenville County and compare it with Emporia's proposal for its own school system. Dr. Tracey said his studies were made with the understanding that it was not the intent of the city to resegregate. He testified that the plan adopted for Greenville County would require additional expenditures for transpor-

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tation and that an examination of the proposed budget for the Greenville County Schools indicated that not only would the additional expenditures not be forthcoming but that the budget increase over the previous year would not even keep up with increased costs due to inflation. Emporia on the other hand proposed increased revenues to increase the quality of education for its students and in Dr. Tracey's opinion the proposed Emporia system would be educationally superior to the Greenville system. Emporia proposed lower student teacher ratios, increased per pupil expenditures, health services, adult education, and the addition of a kindergarten program.

In sum, Emporia's position, referred to by the district court as "uncontradicted," was that effective integration of the schools in the whole county would require increased expenditures in order to preserve education quality, that the county officials were unwilling to provide the necessary funds, and that therefore the city would accept the burden of educating the city children. In this context, it is important to note the unusual nature of the organization of city and county governments in Virginia. Cities and counties are completely independent, both politically and geographically. See *City of Richmond v. County Board*, 199 Va. 679, 684 (1958); *Murray v. Roanoke*, 192 Va. 321, 324 (1951). When Emporia was a town, it was politically part of the county and the people of Emporia were able to elect representatives to the county board of supervisors. When Emporia became a city, it was completely separated from the county and no longer has any representation on the county board. In order for Emporia to achieve an increase in school expenditures for city schools it would have to obtain the approval of the Greenville County Board of

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Supervisors whose constituents do not include city residents.

Determining what is desirable or necessary in terms of funding for quality education is the responsibility of state and school district officers and is not for our determination. The question that the federal courts must decide is, rather, what is the primary purpose of the proposed action of the state officials. See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969). Is the primary purpose a benign one or is the claimed benign purpose merely a cover-up for racial discrimination? The district court must, of course, consider evidence about the need for and efficacy of the proposed action to determine the good faith of the state officials' claim of benign purpose. In this case, the court did so and found explicitly that "[t]he city clearly contemplates a superior quality education program. It is anticipated that the cost will be such as to require higher tax payments by city residents." 309 F. Supp. at 674. Notably, there was no finding of discriminatory purpose, and instead the court noted its satisfaction that the city would, if permitted, operate its own system on a unitary basis.

We think the district court's injunction against the operation of a separate school district for the City of Emporia was improvidently entered and unnecessarily sacrifices legitimate and benign educational improvement. In his commendable concern to prevent resegregation—under whatever guise—the district judge momentarily overlooked, we think, his broad discretion in approving equitable remedies and the practical flexibility recommended by *Brown II* in reconciling public and private needs. We reverse the judgment of the district court and remand with instructions to dissolve the injunction.

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Because of the possibility that Emporia might institute a plan for transferring students into the city system from the county system resulting in resegregation,³ or that the hiring of teachers to serve the Emporia school system might result in segregated faculties, the district court is directed to retain jurisdiction.

Reversed and remanded.

SOBELOFF, *Senior Circuit Judge*, with whom WINTER, *Circuit Judge*, joins, dissenting and concurring specially: In respect to Nos. 14929 and 14930, *United States v. Scotland Neck City Board of Education*, — F. 2d — (4th Cir. 1971), and No. 14990, *Turner v. Littleton-Lake Gaston School District*, — F. 2d — (4th Cir. 1971), the two cases in which I participated, I dissent from the court's reversal in *Scotland Neck* and concur in its affirmance in *Littleton-Lake Gaston*. I would affirm the District Court in each of those cases. I join in Judge Winter's opinion, and since he has treated the facts analytically and in detail, I find it unnecessary to repeat them except as required in the course of discussion. Not having participated in No. 14552, *Wright v. Council of City of Emporia*, — F. 2d — (4th Cir. 1971), I do not vote on that appeal, although the views set forth below necessarily reflect on that decision as well, since the principles enunciated by the majority in that case are held to govern the legal issue common to all three of these school cases.

³ A notice of August 31, 1969, invited applications from the county. Subsequently, the city assured the district court it would not entertain such applications without court permission.

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I

The history of the evasive tactics pursued by white communities to avoid the mandate of *Brown v. Board of Education*, 349 U.S. 294 (1955), is well documented. These have ranged from outright nullification by means of massive resistance laws¹ and open and occasionally violent defiance,² through discretionary pupil assignment laws³ and public tuition grants in support of private segregated schools,⁴ to token integration plans parading under the banner "freedom-

¹ See *Duckworth v. James*, 267 F. 2d 224 (4th Cir. 1959); *Bush v. Orleans Parish School Bd.*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569 (1961); *Bush v. Orleans Parish School Bd.*, 187 F. Supp. 42 (E.D. La. 1960), *aff'd Per curiam*, 365 U.S. 569 (1961); *Aaron v. McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959); *aff'd sub nom., Faubus v. Aaron*, 361 U.S. 197 (1959); *James v. Almond*, 170 F. Supp. 331 (E.D. Va. 1959), *app. dis.*, 359 U.S. 1006 (1959); *Harrison v. Day*, 200 Va. 439, 106 S.E. 2d 636 (1959) (decided the same day as *James v. Almond*, *supra*).

² See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Armstrong v. Board of Education of City of Birmingham, Ala.*, 323 F. 2d 333 (5th Cir. 1963), *cert. denied sub nom., Gibson v. Harris*, 376 U.S. 908 (1964); *Brewer v. Hoxie School District No. 46*, 238 F. 2d 91 (8th Cir. 1956); *Holmes v. Danner*, 191 F. Supp. 394 (M.D. Ga. 1961), *stay denied*, 364 U.S. 939 (1961).

³ See *Northcross v. Board of Education of City of Memphis*, 302 F. 2d 818 (6th Cir. 1962); *Manning v. Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960); *Gibson v. Board of Public Instruction, Dade County, Fla.*, 272 F. 2d 763 (5th Cir. 1959); *Orleans Parish School Board v. Bush*, 242 F. 2d 156 (5th Cir. 1957); *United States Commission on Civil Rights. Civil Rights USA—Public Schools, Southern States*, 2-17 (1962).

⁴ See *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961, *aff'd*, 368 U.S. 515 (1962)).

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of-choice."* One by one these devices have been condemned by the Supreme Court:

[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

Neither these agencies, nor school boards, nor local communities have the right to put roadblocks in the way of effective integration. The Court has declared that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

Today, I fear, we behold the emergence of a further stratagem—the carving out of new school districts in order to achieve racial compositions more acceptable to the white community. The majority frankly acknowledges the "serious danger that the creation of new school districts may prove to be yet another method to obstruct the transition from racially separate school systems to school systems in which no child is denied the right to attend a school on the basis of race," *Emporia, supra* at 4. However, the court fashions a new and entirely inappropriate doctrine to avert that danger. It directs District Courts to weigh and assess the various purposes that may have moved

* See *Green v. County School Board*, 391 U.S. 430 (1968); *Raney v. Board of Education*, 391 U.S. 443 (1968); *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968).

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the proponents of the new school district, with the objective of determining which purpose is dominant. District Courts are told to intercede *only* if they find that racial considerations were the *primary* purpose in the creation of the new school units.* I find no precedent for this test and it is neither broad enough nor rigorous enough to fulfill the Constitution's mandate. Moreover, it cannot succeed in attaining even its intended reach, since resistant white enclaves will quickly learn how to structure a proper record—shrill with protestations of good intent, all consideration of racial factors muted beyond the range of the court's ears.'

If challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding legitimate state interest is demonstrated. This test is more easily applied, more fully implements the prohibition of the Fourteenth Amendment and has already gained firm root in the law. The Supreme Court has explicitly applied this test to state criminal statutes which on their face establish racial classifications. In 1964, striking down a Florida criminal statute which forbade a man and woman of different races to "habitually live in and occupy in the nighttime the same room," the Court stated in an opinion written by Justice White:

* The majority's test as stated in *Emporia, supra*, is as follows: "Is the primary purpose a benign one or is the claimed benign purpose merely a cover-up for racial discrimination?"

' The impracticability of the majority's test is highlighted by the dilemma in which the District Judges found themselves in *Scotland Neck*: "In ascertaining such a subjective factor as motivation and intent, it is of course impossible for this Court to accurately state what proportion each of the above reasons played in the minds of the proponents of the bill, the legislators or the voters of Scotland Neck * * *. *United States v. Halifax County Board of Education*, 314 F. Supp. 65, 72 (E.D.N.C. 1970)."

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Normally, the widest discretion is allowed the legislative judgment * * *; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. [Citations] But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499; and subject to the most "rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States*, 320 U.S. 810, 100.

McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964). Thus, the Court held that the proper test to apply in that case was "whether there *clearly appears* in the relevant materials some *overriding* statutory purpose *requiring* the proscription of the specified conduct when engaged in by a white and a Negro, but not otherwise." *Id.* at 192 [emphasis added]. To the further argument that the Florida statute should be upheld because ancillary to and serving the same purpose as an anti-miscegenation statute presumed valid for the purpose of the case, the Court replied:

There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is

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necessary, and not merely rationally related, to the accomplishment of a permissible state policy. *Id.* at 196 [emphasis added].

There were no dissents in the *McLaughlin* case. The two concurring opinions serve to underline and buttress the test applied by the majority. Justice Harlan, joining the Court's opinion, added:

I agree with the Court * * * that necessity, not mere reasonable relationship, is the proper test, see *ante*, pp. 195-196. *NAACP v. Alabama*, 377 U.S. 288, 307-308; *Saia v. New York*, 334 U.S. 558, 562; *Martin v. Struthers*, 319 U.S. 141, 147; *Thornhill v. Alabama*, 310 U.S. 88, 96; *Schneider v. State*, 308 U.S. 147, 161, 162, 164; see *McGowan v. Maryland*, 366 U.S. 420, 466-467 (Frankfurter, J. concurring).

The fact that these cases arose under the principles of the First Amendment does not make them inapplicable here. Principles of free speech are carried to the States only through the Fourteenth Amendment. The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the Fourteenth Amendment.

Id. at 197. Justice Stewart, speaking for himself and Justice Douglas, expressed the view that the majority's test did not go far enough as applied to a criminal statute because no overriding state purpose could exist.

* * * I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. * * * I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.

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Id. at 198.

Three years later the Court dealt with a Virginia statute prohibiting interracial marriages. The statute was determined to be unconstitutional under the *McLaughlin* test, expressed here in these terms:

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. * * *

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.

Loving v. Virginia, 388 U.S. 1, 11 (1967) [emphasis added]. Justice Stewart filed a separate concurring opinion—reiterating his belief that there could never be a sufficiently compelling state purpose to justify a criminal statute based on racial classification. *Id.* at 13.

Although *McLaughlin* and *Loving* dealt with criminal statutes and express racial classifications, numerous lower court decisions apply the strict "compelling" or "overriding" purpose standard in the civil area as well as the criminal, and extend its application to facially neutral state action which, in reality, is racially discriminatory in its effect. The definitive case is *Jackson v. Godwin*, 400 F. 2d 529. (5th Cir. 1968), in which Judge Tuttle meticulously and exhaustively examines the lower court cases, including those "which have struck down rules and regulations which on their face appear to be non-discriminatory but which in practice and effect, if not purposeful design, impose a

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heavy burden on Negroes and not on whites, and operate in a racially discriminatory manner." *Id.* at 538-39 [emphasis added]. He concludes his analysis with this formulation of the constitutional standard:

In both the areas of racial classification and discrimination and First Amendment freedoms, we have pointed out that stringent standards are to be applied to governmental restrictions in these areas, and rigid scrutiny must be brought to bear on the justifications for encroachments on such rights. The State must strongly show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement, [citations]; and in the absence of such compelling justification the state restrictions are impermissible infringements of these fundamental and preferred rights. *Id.* at 541.

The most recent application of the "compelling and overriding state interest" test is to be found in the Fifth Circuit's decision in *Hawkins v. Town of Shaw*, F. 2d (5th Cir. 1971). The plaintiffs, Negro residents of Shaw, Mississippi, alleged racial discrimination by town officials in the provision of various municipal services. The District Court dismissed the complaint, applying a test akin to that used by the majority in this case: "If actions of public officials are shown to have rested upon rational considerations, irrespective of race or poverty, they are not within the condemnation of the Fourteenth Amendment, and may not be properly condemned upon judicial review." *Hawkins v. Town of Shaw*, 303 F. Supp. 1162, 1168 (N.D. Miss. 1969). The Fifth Circuit reversed, pointing to the standard set forth in *Jackson v. Godwin*, *supra*, and stating, "In applying this test, defendants' actions may be justified only if they show a compel-

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ling state interest." *Hawkins v. Town of Shaw*, F. 2d (5th Cir. 1971) (slip opinion at 3).

In *Hawkins* the Fifth Circuit specifically considered the relevance of the defendant's "intent," or "purpose" as the majority in our case would label it. Conceding that "the record contains no direct evidence aimed at establishing bad faith, ill will or an evil motive on the part of the Town of Shaw and its public officials," *Id.* at (slip opinion at 12), the court held: "Having determined that no compelling state interests can possibly justify the discriminatory results of Shaw's administration of municipal services, we conclude that a violation of equal protection has occurred." *Id.* at (slip opinion at 13) [emphasis in original text].

Just as Shaw's administration of municipal services violates the constitutional guarantee of equal protection, so too does the creation of the new Scotland Neck School District.* The challenged legislation carves an enclave, 57% white and 43% black, from a previously 22% white and 77% black school system. No compelling or overriding state interest justifies the new district, and its formation has a racially discriminatory effect by allowing the white residents of Scotland Neck to shift their children from a school district where they are part of a 22% minority to one where they constitute a 57% majority.

The prevailing opinion draws comfort from the fact that the new school district, because all children in the same grade will attend the same school, will be "integrated throughout." I dare say a 100% white

* Since even the majority concedes that the Littleton-Lake Gaston School District must be enjoined as a racially discriminatory scheme in violation of the Fourteenth Amendment, I do not discuss the facts of that case.

* One percent of the pupils in Halifax County are Indians.

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school district would also be "integrated throughout." The relevant question is what *change* in degree of integration has been effected by the creation of the new district. Here the change is an increase in the percentage of white pupils from 22% to 57%. The Constitution will no more tolerate measures establishing a ratio of whites to blacks which the whites find *more* acceptable than it will measures totally segregating whites from blacks. The 35% shift here is no less discriminatory because it is a shift from 22% to 57% than if it were one from 65% to 100%.¹⁰

The majority opinion makes the puzzling concession that:

If the effect of this act was the continuance of a dual school system in Halifax County or the establishment of a dual system in Scotland Neck it would not withstand challenge under the equal protection clause, but we have concluded that it does not have that effect.

The situation here is that the Act sets up in Halifax County two school systems, one with a 50:43 white to black ratio and the other with a 19:80 white to black ratio, in place of one school system with a 22:77 white to black ratio. Thus, the Act constructs a dual school system in Halifax County by the simple expedient of labeling the two sets of schools as separate districts. The majority does not explain

¹⁰ Judge Winter properly emphasizes in his separate opinion that the effect of the new school districts must be measured by comparing "the racial balance in the preexisting unit with that in the new unit sought to be created, and that remaining in the preexisting unit after the new unit's creation." Focusing, as do I, on the 35% increase in the white student population of the new Scotland Neck School District, he quite correctly notes that "[a] more flagrant example of the creation of a white haven; or a more nearly white haven, would be difficult to imagine."

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why the Act can *create* a dual school system in Halifax County if it could not *continue* a dual system there. Nor do they explain why the Act can *establish* a dual school system in Halifax County if it could not *establish* one in Scotland Neck. Obviously no explanation is possible and the legislation severing the Scotland Neck School District fails to meet the test of the equal protection clause.

II

Even if I accepted the majority's formulation as the proper doctrine to control these cases, which I certainly do not, I think their test is misapplied in *Scotland Neck*. The court accepts at face value the defendants' assertions that local control and increased taxation were the dominant objectives to be fulfilled by the new district, with the ultimate goal of providing quality education to the students of Scotland Neck. The facts plainly are to the contrary and demonstrate that, in projecting the new district, race was the primary consideration. The District Court specifically found that a significant factor in the creation of the new school district was

a desire on the part of the leaders of Scotland Neck to preserve a ratio of black to white students in the schools of Scotland Neck that would be acceptable to white parents and thereby prevent the flight of white students to the increasingly popular all-white private schools in the area.

United States v. Halifax County Board of Education, 314 F. Supp. 65, 72 (E.D.N.C. 1970). The defendants do not contest this finding.¹¹

¹¹ The defendants assert instead that the prevention of white flight is a legitimate goal. However, the Supreme Court in

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What starkly exposes the true purpose impelling the redistricting adventure and belies the professions of lofty objectives is the transfer plan initially adopted by the Scotland Neck City Board of Education." Under that plan, parents residing within Halifax County but outside the newly fashioned district could place their children in the Scotland Neck Schools by paying a fee ranging from \$100 to \$125. The use of transfer plans of this nature as devices to thwart the mandate of *Brown v. Board of Education, supra*, has not been uncommon," and the majority here has no difficulty in recognizing that the Scotland Neck transfer plan was a contrivance to perpetuate segregation. Initial applications for transfer under the plan were received from 350 white and only 10 black children in Halifax County. The net result would have been a racial mix of 74% white, 26% black in the Scotland Neck School District, contrasting with 82% black, 17% white, 1% Indian, in the rest of Halifax County.

Monroe v. Board of Commissioners, 391 U.S. 450, 459 (1968), has directly addressed itself to this argument, and rejected it out of hand: "We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, at 300.

See also *Brunson v. Board of Trustees of School District No. 1 of Clarendon County*, 429 F. 2d 820 (4th Cir. 1970); *Anthony v. Marshal County Board of Education*, 409 F. 2d 1287 (5th Cir. 1969). The defendants' candid admission serves only to emphasize the dominant racial considerations behind the whole scheme.

"Although the School Board later abandoned the transfer plan, its initial adoption nevertheless reflects the Board's intentions.

"See *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968); *Gross v. Board of Education*, 373 U.S. 683 (1963).

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Thus the transfer plan would have operated directly contrary to the obligation to desegregate the schools of Halifax County and distinctly evidences the design of the Scotland Neck School Board to bring into existence a white haven.

Curiously enough, despite its condemnation of the transfer plan, the court declares the plan not relevant in assessing the intent of the North Carolina legislature in enacting Chapter 31, since there is no evidence in the record to show that the legislative body knew a transfer plan would be effected. This reasoning is fallacious for legislators are not so naive and, in any event, are chargeable with the same motivations as the local communities concerned. The relevant inquiry under the majority's test is into the purposes for which state action was taken and, as Judge Winter observes in his separate opinion, when dealing with statutes designed to affect local communities, one must look to the localities to determine the purposes prompting the legislation."

The size of the new school district in Scotland Neck is also a crucial factor to be taken into account in judging the genuineness of the alleged goal of quality education. The Report of the Governor's Study Commission on the Public School System of North Carolina favors the *consolidation* of school districts to increase efficiency in the operations of the public schools,

"Moreover, as the District Court noted, local newspapers, including the *Raleigh News and Observer*, suggested that racial considerations, and not a concern for better educational, motivated the legislation. For example, on February 14, 1969, a month before Chapter 31 was enacted, the *Raleigh News and Observer* commented editorially that the bill provided for an "educational island" dominated by whites and on February 22, 1969, suggested that if the bill passed, it would encourage other school districts to resort to similar legislation.

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and suggests 9,000-10,000 as a desirable pupil population, with 3,500 to 4,000 as a minimum. Scotland Neck's minuscule new school district for 695 pupils—one fifth of the suggested minimum—is an anomaly that runs directly counter to the recommendation of the Study Commission that schools be merged into larger administrative units. Moreover, if quality education were the true objective and Scotland Neck residents were deeply concerned with increasing revenue to improve their schools, one might have expected that in-depth consideration would have been given to the financial and educational implications of the new district. However, the District Court found that:

[t]here were no studies made prior to the introduction of the bill with respect to the educational advantages of the new district, and there was no actual planning as to how the supplement would be spent although some people assumed it would be spent on teachers' supplements.

United States v. Halifax County Board of Education,
314 F. Supp. at 74.

Also highly relevant in assessing the dominant purpose is the timing of the legislation splintering the Halifax County school system. During the 1967-68 school year the Halifax County School District maintained racially identifiable schools, and only 46 of the 875 students attending the Scotland Neck school were black. The next school year, under prodding by the Department of Justice, the Halifax County Board of Education assigned to the Scotland Neck school the entire seventh and eighth grades from an adjacent all-black county school, and promised to desegregate completely by 1969-70. A survey by the North Carolina State Department of Education in December 1968 recommended an integration plan which provided that

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690 black and 325 white students should attend the Scotland Neck school. It was only then that the bill which later became Chapter 31 was introduced in the General Assembly of North Carolina in 1969. The fact that the Scotland Neck School District was not formed until the prospects for a unitary school system in Halifax County became imminent leads unmistakably to the conclusion that race was the dominant consideration and that the goal was to achieve a degree of racial apartheid more congenial to the white community.¹⁵

III

The court's incongruous holdings in these two cases, reversing the District Court in *Scotland Neck*, while affirming in the twin case, *Littleton-Lake Gaston*, cannot be reconciled. The uncontested statistics presented in *Scotland Neck* speak even louder in terms of race than the comparable figures for *Littleton-Lake Gaston*. The white community in Scotland Neck has sliced out a predominantly white school system from an overwhelmingly black school district. By contrast, the white community in Littleton-Lake Gaston was more restrained, gerrymandering a 46% white, 54% black, school unit from a county school system that was 27% white, 67% black.¹⁶ The majority attempts to escape the inevitable implications of these statistics by attributing to the North Carolina legislature, which severed the Scotland Neck School District on March 3, 1969, benevolent motivation and obliviousness to the

¹⁵ It is also noteworthy that while the Scotland Neck community claims that it had not been accorded a fair allocation of county school funds over a period of years, this apparently became intolerable only when the Department of Justice exerted pressure for immediate action to effectuate integration.

¹⁶ Six percent of the pupils in Warren County are Indian.

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racial objectives of the local white community. Yet the majority unhesitatingly finds a discriminatory purpose in the similar excision of the new Littleton-Lake Gaston School District by the same legislators only one month later, on April 11, 1969. The earlier statute no less than the later provided a refuge for white students and maximized preservation of segregated schools. The record and the District Court's opinion in *Scotland Neck*, no less than the record and the opinion in *Littleton-Lake Gaston*, are replete with evidence of discriminatory motivations. On their facts the two cases are as alike as two peas in a pod.

Judge Bryan soundly recognizes the discordance in the two holdings of the majority. The resolution he proposes is to reverse in both cases. This would indeed cure the inconformity, but at the cost of compounding the error. The correction called for lies in the opposite direction—affirmance in both cases.

IV

If, as the majority directs, federal courts in this circuit are to speculate about the interplay and the relative influence of divers motives in the molding of separate school districts out of an existing district, they will be trapped in a quagmire of litigation. The doctrine formulated by the court is ill-conceived, and surely will impede and frustrate prospects for successful desegregation. Whites in counties heavily populated by blacks will be encouraged to set up, under one guise or another, independent school districts in areas that are or can be made predominantly white.

It is simply no answer to a charge of racial discrimination to say that it is designed to achieve "quality education." Where the effect of a new school district is to create a sanctuary for white students, for which

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no compelling and overriding justification can be offered, the courts should perform their constitutional duty and enjoin the plan, notwithstanding professed benign objectives.

Racial peace and the good order and stability of our society may depend more than some realize on a convincing demonstration by our courts that true equality and nothing less is precisely what we mean by our proclaimed ideal of "the equal protection of the laws." The palpable evasions portrayed in this series of cases should be firmly condemned and enjoined. Such examples of racial inequities do not go unheeded by the adversely affected group. They are noted and resented. The humiliations inflicted by such cynical maneuvers feed the fires of hostility and aggravate the problem of maintaining peaceful race relations in the land. In this connection it is timely to bear in mind the admonition of the elder Mr. Justice Harlan, dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896):

The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.

I dissent from the reversal in Nos. 14929 and 14930, *United States v. Scotland Neck City Board of Education*, — F. 2d — (4th Cir. 1971), and concur in the affirmance in No. 14990, *Turner v. Littleton-Lake Gaston School District*, — F. 2d — (4th Cir. 1971).

ALBERT V. BRYAN, *Circuit Judge*, dissenting:
For me there is here no warrant for a decision different from the *Scotland Neck* and *Emporia* deter-

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minations. This conclusion derives from the majority's exposition of the fact parallel of these cases with the circumstances of *Littleton-Lake Gaston*. The identicalness irresistibly argues a like disposition—reversal of the judgment on appeal.

WINTER, *Circuit Judge*, dissenting and concurring specially: I dissent from the majority's opinion and conclusion in No. 14,552, *Wright v. Council of City of Emporia*, — F. 2d — (4 Cir. 1971), and in Nos. 14929 and 14930, *United States v. Scotland Neck City Board of Education*, — F. 2d — (4 Cir. 1971). I concur in the judgment in No. 14990, *Turner v. Littleton-Lake Gaston School District*, — F. 2d — (4 Cir. 1971), and I can accept much of what is said in the majority's opinion. There is, however, a broader basis of decision than that employed by the majority on which I would prefer to rest.

Because the majority makes the decision in *Emporia* the basis of decision in *Scotland Neck* and distinguishes them from *Littleton-Lake Gaston*, I will discuss the cases in that order. I would conclude that the cases are indistinguishable, as does my Brother Bryan, although I would also conclude that each was decided correctly by the district court and that in each we should enjoin the carving out of a new school district because it is simply another device to blunt and to escape the ultimate reach of *Brown v. Board of Education*, 347 U.S. 483 (1954), and subsequent cases.

I

While the legal problem presented by these cases is a novel one in this circuit, I think the applicable legal standard is found in the opinion of the Supreme Court in *Green v. County School Board of New Kent*

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County, 391 U.S. 430 (1968). In rejecting a "freedom of choice" plan under the circumstances presented there, the Court articulated the duties of both a school board and a district court in implementing the mandate of *Brown*:

The burden on a school board today is to come forward with a plan that promises realistically to work, and *promises realistically to work now*.

* * * *

Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "*at the earliest possible date*," then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; *and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method*. [emphasis added.]

391 U.S. at 439.

In each of the instant cases, following a protracted period of litigation, a plan designed finally to institute a unitary school system was jeopardized by the attempt of a portion of the existing school district to break away and establish its own schools. I think the advocates of such a subdivision bear the "heavy burden" of persuasion referred to in *Green* because, as in that case, the dominant feature of these cases is the last-minute proposal of an alternative to an existing and workable integration plan. Factually, these cases are not significantly dissimilar from *Green*. Each act of secession would necessarily require the submission and approval of new integration plans for the newly-created districts, and thus each is tantamount to the proposal of a new plan. And while the act giving rise to the alternative approach here is

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state legislation rather than a proposal of the local school board, the fact remains that the moving force in the passage of each piece of legislation¹ was of local origin. Few who have had legislative experience would deny that local legislation is enacted as a result of local desire and pressure. It is, therefore, to local activities that one must look to determine legislative intent.

Application of the "heavy burden" standard of *Green* to the instant cases is also supported by considerations of policy. In an area in which historically there was a dual system of schools and at best grudging compliance with *Brown*, we cannot be too careful to search out and to quash devices, artifices and techniques furthered to avoid and to postpone full compliance with *Brown*. We must be assiduous in detecting racial bias-masking under the guise of quality education or any other benevolent purpose. Especially must we be alert to ferret out the establishment of a white haven, or a relatively white haven, in an area in which the transition from racially identifiable schools to a unitary system has proceeded slowly and largely unwillingly, where its purpose is at least in part to be a white haven. Once a unitary system has been established and accepted, greater latitude in redefinition of school districts may then be permitted.

Given the application of the *Green* rationale, the remaining task in each of these cases is to discern whether the proposed subdivision will have negative effects on the integration process in each area, and, if so, whether its advocates have borne the "heavy burden" of persuasion imposed by *Green*.

¹ In *Emporia*, the implementing legislation for the separation already existed; however, the local people alone made the choice to exercise the option which the statute provided.

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II

EMPORIA SCHOOL DISTRICT

The City of Emporia, located within the borders of Greensville County, Virginia, became a city of the second class on July 31, 1967, pursuant to a statutory procedure dating back to the 19th Century. While it had the state-created right at that time to establish its own school district, it chose instead to remain within the Greensville County system until June, 1969. It is significant that earlier in this same month, more than a year after it had invalidated a "freedom of choice" plan for the Greensville County system, the district court ordered into effect a "pairing" plan for the county as a further step toward full compliance with *Brown* and its progeny.

The record amply supports the conclusion that the creation of a new school district for the City of Emporia would, in terms of implementing the principles of *Brown*, be "less effective" than the existing "pairing" plan for the county system. In the first place, the delay involved in establishing new plans for the two new districts cannot be minimized in light of the Supreme Court's statement in *Green* that appropriate and effective steps must be taken at once. See also *Carter v. West Feliciana School Board*, 396 U.S. 290 (1970); *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969). Secondly, as the district court found, the separation of Emporia from Greensville County would have a substantial impact on the racial balance both within the county and within the city. Within the entire county, there are 3,759 students in a racial ratio of 34.1% white and 65.9% black. Within the city there are 1,123 students, 48.3% of whom are white and 51.7% are black. If the city is permitted to establish

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its own school system, the racial ratio in the remainder of the county will change to 27.8% white and 72.2% black.² To me the crucial element in this shift is not that the 48.3%-51.7% white to black ratio in the town does not constitute the town a white island in an otherwise heavily black county and that a shift of 6% in the percentage of black students remaining in the county is not unacceptably large. Whenever a school area in which racial separation has been a historical fact is subdivided, one must compare the racial balance in the preexisting unit with that in the new unit sought to be created, and that remaining in the preexisting unit after the new unit's creation. A substantial shift in any comparable balances should be cause for deep concern. In this case the white racial percentage in the new unit will increase from 27.8% to 48.3%. To allow the creation of a substantially whiter haven in the midst of a small and heavily black area is a step backward in the integration process.

And finally, the subdivision of the Greenville County school district is "less effective" in terms of the principles of *Brown* because of the adverse psychological effects on the black students in the county which will be occasioned by the secession of a large portion of the more affluent white population from the county schools. If the establishment of an Emporia school district is not enjoined, the black students in

² As part of the establishment of the new system, the Emporia school board proposed a transfer plan whereby Emporia will accept county students upon payment of tuition. The record does not contain any projection of the number of county students who would avail themselves of the plan although in argument counsel was candid in stating that only white parents would be financially able to exercise the option. The transfer plan was quickly abandoned when it became apparent that it might not earn the approval of the district court.

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the county will watch as nearly one-half the total number of white students in the county abandon the county schools for a substantially whiter system. It should not be forgotten that psychological factors, and their resultant effects on educational achievement, were a major consideration in the Supreme Court's opinion in *Brown*.

In my mind, the arguments advanced by the residents of Emporia in support of their secession from the county school system do not sustain the "heavy burden" imposed by *Green*. The essence of their position is that, by establishing their own schools over which they will exercise the controlling influence, they will be able to improve the quality of their children's education. They point to a town commitment to such a goal and, in particular, to a plan to increase educational revenues through increased local taxation. They also indicate that they presently have very little voice in the management of the county school system. Although, as the district court found, the existence of these motives is not to be doubted, I find them insufficient in considering the totality of the circumstances.

While the district court found that educational considerations were a motive for the decision to separate, it also found that "race was a factor in the city's decision to secede." Considering the timing of the decision in relation to the ordering into effect of the "pairing" plan, as well as the initial proposal of a transfer plan, this finding is unassailable. *Green* indicates that the absence of good faith is an important consideration in determining whether to accept a less effective alternative to an existing plan of integration. The lack of good faith is obvious here.

When the educational values which the residents of Emporia hope to achieve are studied, it appears that the secession will have many deleterious consequences.

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As found by the district court, the high school in the city will be of less than optimum size. County pupils will be cut off from exposure to a more urban society. The remaining county system will be deprived of leadership ability formerly derived from the city. It will suffer from loss of the city's financial support, and it may lose teachers who reside in the city. To me, these consequences, coupled with the existence of the racial motive, more than offset the arguments advanced by the residents of Emporia. The separation, with its negative effects on the implementation of the principles of *Brown*, should be enjoined.

III

SCOTLAND NECK SCHOOL DISTRICT

As the majority's opinion recites, the history of resistance to school desegregation in the Halifax County school system parallels the history of the attempts on the part of the residents of Scotland Neck to obtain a separate school district. The significant fact is that in spite of otherwise apparently cogent arguments to justify a separate system, the separate system goal was not realized until, as the result of pressure from the United States Department of Justice, the Halifax County Board agreed to transfer the seventh and eighth grade black students from the previously all-black Brawley School, outside the city limits of Scotland Neck, to the Scotland Neck School, previously all-white. Chapter 31 followed thereafter as soon as the North Carolina legislature met. It is significant also that the Halifax County Board reneged on its agreement with the Department of Justice shortly before the enactment of Chapter 31.

The same negative effects on achieving integration which are present in the Emporia secession are present

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here. Although the City of Scotland Neck has already submitted a plan for its school district, delay will result in devising such a plan for the remaining portion of Halifax County. The racial balance figures show that the existing county system has 8,196 (77%) black students, 2,357 (22%) white students, and 102 (1%) Indian students. Within the city system, there would be 399 (57.4%) white and 296 (42.6%) black, while the remaining county system would be comprised of 7,900 (80%) black, 1,958 (19%) white and 102 (1%) Indian. The difference between the percentage of white students within the existing system and the newly-created one for Scotland Neck is thus 35%. A more flagrant example of the creation of a white haven, or a more nearly white haven, would be difficult to imagine. The psychological effects on the black students cannot be overestimated.

The arguments advanced on behalf of Scotland Neck are likewise insufficient to sustain the burden imposed by *Green*. Even if it is conceded that one purpose for the separation was the local desire to improve the educational quality of the Scotland Neck schools, the record supports the conclusion of the district court that race was a major factor. If the basic purpose of Chapter 31 could not be inferred from the correlation of events concerning integration litigation and the attempt to secede, other facts make it transparent. As part of its initial plan to establish a separate system, Scotland Neck proposed to accept transfer students from outside the corporate limits of the city on a tuition basis. Under this transfer system, the racial balance in the Scotland Neck area was 749 (74%) white to 262 (26%) black, and the racial balance in the rest of Halifax County became 7,934 (82%) black, 1,608 (17%) white, and 102

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(1%) Indian.³ This proposal has not yet been finally abandoned. In oral argument before us, counsel would not tell us forthrightly that this would not be done, but rather, equivocally indicated that the proposal would be revived if we, or the district court, could be persuaded to approve it. I cannot so neatly compartmentalize Chapter 31 and the transfer plan as does the majority, and conclude that one has no relevance to the other. To me, what was proposed, and still may be attempted, by those who provided the motivation for the enactment of Chapter 31 is persuasive evidence of what Chapter 31 was intended to accomplish.

In terms of educational values, the separation of Scotland Neck has serious adverse effects. Because Scotland Neck, within its corporate boundaries, lacked sufficient facilities even to operate a system to accommodate the only 695 pupils to be educated, it purchased a junior high school from Halifax County. This school is located outside of the corporate boundaries of Scotland Neck. The sale deprives the students of Halifax County, outside of Scotland Neck of a school facility. The record contains abundant, persuasive evidence that the best educational policy and the nearly unanimous opinion of professional educa-

³ There is apparent error in the computations made by the district court in this regard. The district court found that the net effect of the transfer plan would be to add 350 white students to the city system. Added to the resident white students (399), the total is 749, not 759 as indicated in the opinion of the district court. The district court's figure of 262 black students in the city under the transfer plan (a net loss of 34) appears correct. But when these two totals are subtracted from the figures given for the existing county system in 1968-1969 (2,357 white, 8,196 black and 102 Indian), the effects on the county are as shown above.

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tors runs contrary to the creation of a small, separate school district for Scotland Neck. A study by the State of North Carolina indicates that a minimally acceptable district has 3,500-4,000 pupils.

On the facts I cannot find the citizens of Scotland Neck motivated by the benign purpose of providing additional funds for their schools; patently they seek to blunt the mandate of *Brown*. Even if additional financial support for schools was a substantial motive, the short answer is that a community should not be permitted to buy its way out of *Brown*. Here again, the "heavy burden" imposed by *Green* has not been sustained.

IV

LITTLETON-LAKE GASTON SCHOOL DISTRICT

The majority's opinion correctly and adequately discloses the legislative response to court-ordered compliance with *Brown* and its progeny. That response was the creation of the Warrenton City School District and the Littleton-Lake Gaston School District. The overall effect of the creation of the Littleton-Lake Gaston district, the proposed tuition transfer plan, and the creation of the Warrenton City district (an act enjoined by the district court and not before us) would be to permit more than 4 out of 5 white students to escape the heavily black schools of Warren County. Even without the transfer plan, the racial balance in the Littleton-Lake Gaston district would show nearly 20% more white students than in the existing Warren County unit. To permit the subdivision would be to condone a devastating blow to the progress of school integration in this area.

Despite the assertion of the benign motives of remedying long-standing financial inequities and the

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preservation of local schools, I agree with the majority that the "primary" purpose and effect of the legislation creating the Littleton-Lake Gaston school district was to carve out a refuge for white students and to preserve to the fullest possible extent segregated schools. Aside from questions of motivation, the record shows that the new district was established to accommodate a total of only 659 students, despite state policy to the contrary and expert opinion that its small size rendered it educationally not feasible. And, as the majority indicates, there is no evidence that the residents of the Littleton area have been deprived of their proportionate voice in the operation of the schools of Warren County. In short, there is a complete absence of persuasive argument in favor of the creation of the new district.

While I agree that the injunction should stand, I disagree that injunctive relief should be granted only when racial motivation was the "primary" motive for the creation of the new district. Consistent with *Green*, we should adopt the test urged by the government in *Scotland Neck*, i.e., to view the results of the severance as if it were a part of a desegregation plan for the original system—that is, to determine whether the establishment of a new district would, in some way, have an adverse impact on the desegregation of the overall system. By this test the injunction would stand in the *Littleton-Lake Gaston* case, as well as in each of the two other cases, because in each of the three there is at least some racial motivation for the separation and some not insubstantial alteration of racial ratios, some inherent delay in achieving an immediate unitary system in all of the component parts, and an absence of compelling justification for what is sought to be accomplished.

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BUTZNER, Circuit Judge: This appeal involves the same case in which I decided questions concerning the school board's compliance with the Fourteenth Amendment when I served on the district court.* While the details differ, the same basic issues remain—the validity of measures taken to disestablish a dual school system, to create a unitary system, and to assign pupils and faculty to achieve these ends.

Title 28 U.S.C. § 47 provides: “No judge shall hear or determine an appeal from the decision of a case or issue tried by him.”

Recently, Judge Craven carefully examined this statute and the cases and authorities which cast light on it. He concluded that he should not sit on an appeal of a case in which he had participated as a district judge when the ultimate questions were the same: “what may a school board be compelled to do to dismantle a dual system and implement a unitary one, or how much school board action is enough?” See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 431 F. 2d 135, (4th Cir. 1970). Following the sound precedent established by Judge Craven, I believe that I must disqualify myself from participating in this appeal.

* See *Wright v. County School Bd. of Greensville County, Va.*, 252 F. Supp. 378 (E.D. Va. 1966). Two other opinions were not published.

Judgment**UNITED STATES COURT OF APPEALS****FOR THE FOURTH CIRCUIT****No. 14,552****PECOLA ANNETTE WRIGHT, et al.,***Appellees,***v.****COUNCIL OF THE CITY OF EMPORIA AND THE MEMBERS THEREOF,
AND SCHOOL BOARD OF THE CITY OF EMPORIA AND THE
MEMBERS THEREOF,***Appellants.*

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court the the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and the case is remanded to the United States District Court for the Eastern District of Virginia, at Richmond, with instructions to dissolve the injunction; and because of the possibility that Emporia might institute a plan for transferring students into the city system from the county system resulting in resegregation, or that the hiring of teachers to serve the Emporia school system might result in segregated faculties, the district court is directed to retain jurisdiction.

/s/ SAMUEL W. PHILLIPS

Clerk

Supreme Court of the United States

No. 70-188 ---, October Term, 1971.

Pecola Annette Wright,
et al.,

Petitioners,

v.

Council of the City of
Emporia, et al.

ORDER ALLOWING CERTIORARI. Filed October 12, 1971.

The petition herein for a writ of certiorari to the United States Court of

Appeals for the Fourth Circuit is granted.

v

FILE COPY

Supreme Court, U.S.

FILED

MAY 20 1971

E. ROBERT SEAWER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1730~~ 70-18

PECOLA ANNETTE WRIGHT, *et al.*,

Petitioners,

—v.—

COUNCIL OF THE CITY OF EMPORIA, *et al.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
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IN THE
Supreme Court of the United States

October Term, 1970

No.

PECOLA ANNETTE WRIGHT, *et al.*,

Petitioners,

—v.—

COUNCIL OF THE CITY OF EMPORIA, *et al.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Opinions Below

The majority opinions of the Court of Appeals and the dissenting opinions (Judges Sobeloff and Winter) are reprinted *infra*, pp. 1a-62a and are not yet reported. The judgment of the Court of Appeals is reprinted *infra*, p. 99a.¹

The order of the district court granting a temporary injunction, as well as the court's Findings of Fact and Conclusions of Law thereon, are not reported and are reprinted *infra*, pp. 80a-85a. The opinion on permanent injunction is reported at 309 F. Supp. 671 and is reprinted *infra*, pp. 63a-79a.

¹ On April 21, 1971, the Court of Appeals stayed its mandate pending application for certiorari, on the condition that this Petition be filed by May 21, 1971.

A previous district court opinion in this litigation is reported as *Wright v. County School Bd. of Greenville County*, 252 F. Supp. 378 (E.D. Va. 1966).

Jurisdiction

The judgment and opinion of the Court of Appeals were entered March 23, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

This litigation was commenced in 1965 to desegregate the public schools of Greenville County, Virginia. The district court in June, 1969, ordered a pairing plan into effect. Thereafter, the City of Emporia—located within Greenville County—sought to operate separate schools for City residents. The City schools would have a substantially greater proportion of white students than either the remaining county schools or the schools of the original combined system. The district court enjoined the operation of separate school systems because it would create a "substantial shift in the racial balance." The Court of Appeals reversed, holding that the "primary" or "predominant purpose" of separation had not been shown to be "to retain as much separation of the races as possible."

1. Did the Court of Appeals err in permitting division of a school district, required by law to desegregate, into separate school systems of substantially differing racial composition?

2. Did the Court of Appeals err in dissolving the district court's injunction against creation of a new school system which the district court found would interfere with its desegregation decree?

3. Did the Court of Appeals err in applying a subjective test of motive to the proposed secession, rather than an objective test of result as required by the decisions in *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968) and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, No. 281, O.T. 1970?

Constitutional and Statutory Provisions Involved

This matter involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following sections of the Virginia Code (statutes related to the operation of school districts and divisions within the Commonwealth of Virginia) are set out in the Appendix, *infra* pp. 86a-98a: §§22-7, -30, -34, -42, -61, -68, -72, -89, -97, -99, -100.1, -100.2, and -100.3.

Statement

This is one of three cases decided together by the Court of Appeals involving the relationship between desegregation and the creation of new school districts. In each instance, a portion of a larger district desegregating under

federal court order or in accordance with the requirements of the Civil Rights Act of 1964, 42 U.S.C. §§2000d *et seq.*, was sought to be detached and operated as a separate school system. In each instance, federal district courts found a significant difference in racial composition between the proposed new districts and the old, found that race was one of the motivating factors for establishing the new district, and enjoined creation of separate school systems. In one case (56a-62a)² the Court of Appeals affirmed; in this case and in the third (*United States v. Scotland Neck City Bd. of Educ.*, No. 1614, O.T. 1970),³ the Court of Appeals reversed, on the grounds that the *predominant* motive for carving out the new districts was not "to retain as much of separation of the races as possible."

The background of this litigation is set out in the margin.⁴

² Citations given are to the Appendix to this Petition, *infra*.

³ That case is already pending before this Court for review upon the petition of the United States. Simultaneously with the filing of this Petition, attorneys for the plaintiffs-intervenors Pattie Black Cotton, et al. are also filing a Petition for Writ of Certiorari in the *Scotland Neck* matter.

⁴ This case was commenced March 15, 1965 by parents and Negro students within Greensville County, Virginia. At that time, Emporia had the status, under Virginia law, of a "Town." Its students were educated by the County School Board of Greensville County in buildings owned by that Board. Historically, white students [from the Town and the remaining area of the County] attended only two schools in the system, both of which were physically located within the Town; Negro students [from the Town and the County] attended the various other schools, all but one of which were located outside the Town of Emporia (64a).

In 1966, the district court approved and ordered into effect a "free choice" plan of desegregation; *Wright v. County School Bd. of Greensville County*, 252 F. Supp. 378 (E.D. Va. 1966). The district court subsequently found, however, that under this plan some Negro students entered the formerly white schools within Emporia but no white students chose to attend any Negro school. The district court therefore disapproved the continued use of free choice (64a-65a).

On June 17, 1969, following an evidentiary hearing on the County School Board's desegregation plan, the district court announced its intention of approving a pairing plan submitted by plaintiffs, and a written order to that effect was entered June 25, 1969 (65a).⁵ On July 7, 1969, the City Council of Emporia addressed a letter to the Greensville County Board of Supervisors and the County School Board, requesting that ownership of the schools within the Emporia corporate limits be transferred to the City, by lease or sale, in order that the City might operate its own school system (Plaintiffs' Trial Exhibit No. 6). The letter stated:

The pending Federal Court action, at the time of Emporia's transition from a town to a city, was finally decided by the court on June 23, 1969. The resulting order REQUIRES massive relocation of school classes, excessive bussing of students and mixing of students within grade levels with complete disregard of individual scholastic accomplishment or ability.

An in-depth study and analysis of the directed school arrangement reflects a totally unacceptable situation to the Citizens and City Council of the City of Emporia.

IV. [If the City operates a separate school system,] The City will accept on a first come, first serve, no

In the meantime, the population of the Town of Emporia had increased sufficiently to permit it to become a city of the second class, which it elected to do on July 31, 1967 (80a). As of that time, the City—now an independent political entity—was free to seek to operate its own school system, separate from the County, but Emporia chose not to do so. Instead, it attempted to negotiate an agreement with the Greensville County School Board to operate joint schools (Va. Code Ann. §22-7) and ultimately signed a contract with the County School Board pursuant to which the County agreed to educate city children in the schools it owned in exchange for payment by the City of 34.26% of the cost of operation (80a).

⁵ That plan was modified on July 30, 1969 as suggested by the County School Board (65a).

transportation basis, any and all students residing in Greenville County who wish to complete or continue their education in City schools. Out-of-City students will be required to pay a tuition fee, based on present pupil operating cost, less financial aids collectible from the Commonwealth.

July 14, 1969, the City Council met "to take action on the establishment of a City School System, to try and save a school system for the City of Emporia and Greenville County" (official minutes of meeting, Plaintiffs' Trial Exhibit No. 12) (emphasis supplied). At that time, the minutes reflect that the Mayor of Emporia stated, "it's ridiculous to move children from one end of the County to the other end, and one school to another, to satisfy the whims of a chosen few." He said, "The City of Emporia and Greenville County are as one, we could work together to save our school system." (emphasis supplied) (*ibid.*).

The City Council was informed of the percentage of students at each school who would be Negroes under the plan ordered by the district court, and also that the Board of Supervisors had declined to transfer school properties as requested in the July 7 letter, because of the outstanding district court order governing their use. The meeting concluded with the adoption of a resolution instructing the City School Board to take the necessary steps to establish a School Division of the City of Emporia separate and apart from Greenville County (*ibid.*).⁶

⁶ The basic Virginia administrative school unit is the "school division," and Va. Code Ann. §22-30 requires the State Board of Education to divide the entire Commonwealth into an "appropriate" number of school divisions of not less than one county or city each. When Emporia achieved city status, it became entitled to have a City School Board elected by its City Council (Va. Code Ann. §22-89) and to purchase the school buildings located within the City, either for an agreed price or at a value established in

Accordingly, the Emporia City School Board met July 17, 1969 and determined to request that the State Board of Education create a new, separate school division for the City alone (Plaintiffs' Trial Exhibit No. 23). A similar request to the State Board was adopted by the City Council on July 23, 1969 (Plaintiffs' Trial Exhibit No. 12). On July 30, 1969, the City School Board authorized registration of pupils even though the State Board had not yet ruled (Plaintiffs' Trial Exhibit No. 23) and on July 31, 1969, registration notices (with the provision for tuition-paying out-of-city students) were mailed (Plaintiffs' Trial Exhibit No. 25).

August 1, 1969, plaintiffs filed a Supplemental Complaint alleging that the Emporia City Council and School Board were taking steps to operate a separate Emporia school system, and would not contribute anticipated funds toward the operation of the Greenville County schools during the 1969-70 school year in the manner directed by the district court's July 30 order. The Supplemental Complaint sought joinder of the additional parties and an order restraining interference with the execution of the court's July 30 decree.

A hearing on temporary injunction was held August 8, 1969. The Mayor of Emporia and the Chairman of the City School Board testified that the immediate motivation behind the move to establish a separate school system was the district court's order desegregating the entire Greenville County school system according to a plan whereby students must attend six schools during their twelve years

court proceedings. However, it could not operate a separate school system unless it was named a separate school division by the State Board. Initially, Greenville County and the City of Emporia together were designated a single school division by the State Board of Education. See Defendants' Trial Exhibit E-1.

of public education (Transcript of hearing, August 8, 1969, pp. 116, 154, 176). The Mayor also noted that Greenville County white students already were attending a private school in an adjacent county, that the June 25 order had led to increased interest in private schools, and that he believed a separate school system would prevent a mass exodus of Emporia whites to private schools (*Id.* at 116-17, 182).

The district court granted the temporary injunction, ruling from the Bench that racial considerations lay behind the sudden decision to establish a separate school system:

The Court finds that after this Court's order of June 25, 1969, a meeting of the Council was held, according to the minutes contained in Plaintiffs' Exhibit 12, and the Mayor of the City of Emporia stated to the Council his opinion concerning the plan that had been approved by this Court. Without quoting him it certainly evidenced a disagreement.

The Court finds at that time a member of the School Board reported to Council the percentage of Negroes in each school for the first seven grades. It is apparent that therein was borne [sic] the idea that this [City] School Board [which] had never functioned as a School Board except for purposes of discussing with the School Board of Greenville County the salary of the superintendent and selection, who had never functioned, had been created only because the law required that there be a School Board in the city, they then decided that they would operate a school. . . .

The mere fact that there is a Board that, for all practical purposes, is a moot Board for the city, and there is a county contri[g]uous thereto, the process of desegregation ought not and cannot be thwarted

by drawing a line between Emporia and Greenville County, . . .

In short, gentlemen, I might as well say what I think it is. It is a plan to thwart the integration of schools. This Court is not going to sit idly by and permit it. I am going to look at any further action very, very carefully. I don't mind telling you that I would be much more impressed with the motives of these defendants had I found out they had been attempting to meet with the School Board of Greenville County to discuss the formation of a plan for the past year. I am not impressed when it doesn't happen until they have reported to them the percentage of Negroes that will be in each school.

(Transcript of hearing, August 8, 1969, pp. 204-207. See also the Findings of Fact and Conclusions of Law, *infra* pp. 81a-83a).

Pursuant to the district court's temporary injunction, schools in Emporia and Greenville County opened for 1969-70 in accordance with the court's June 30, 1969 order. On August 19-20, 1969, the State Board of Education tabled Emporia's request for separate school division status "in light of matters pending in the federal court." (Defendants' Trial Exhibit E-I). The City Board hired Dr. H. I. Willett, former school superintendent of Richmond, Virginia, to prepare a proposed budget for the school year 1970-71 (Defendants' Trial Exhibit E-G).

At the hearing on permanent relief held December 18, 1969, the Mayor and the Chairman of the City School Board testified that the City of Emporia desired to offer a "superior" educational program through the device of operating a separate school system; that in their opinion,

the County officials would not allocate the increased expenditures required by desegregation; that City residents would be willing to pay the increased taxes which would be necessitated if the City operated an educational program of the magnitude suggested by Dr. Willett's draft budget. The City also called Dr. Neal Tracey, a professor of school administration, who supported the view that a separate Emporia school system with the programs and expenditure levels proposed by Dr. Willett would be superior in some ways to the educational program then being offered in the County schools. Dr. Tracey agreed with Emporia officials that the Greensville County School budget for 1969-70 ought to have been higher. However, he also recognized educational disadvantages flowing from the operation of separate systems (76a-77a).

Dr. Tracey did not evaluate the proposal from the standpoint of desegregation; he considered the different racial compositions of the two separate systems irrelevant to his analysis:

No, my basic contention is, and has been, that elimination of the effects of segregation must be an educational solution to the problem and that no particular pattern of mixing has in and of itself, has any desirable effect.

(Transcript of hearing, December 18, 1969, p. 68).

It was undisputed that the racial compositions of the two separate school systems would differ significantly from each other, and as well from the original combined unit. The following table, drawn from the district court's findings, illustrates the change:

TABLE 1—COMPARISON OF STUDENT ENROLLMENTS

	<u>Combined System</u>			<u>City of Emporia</u>			<u>Greensville County</u>		
	<u>Black Students</u>		<u>No. White Students</u>	<u>Black Students</u>		<u>No. White Students</u>	<u>Black Students</u>		<u>No. White Students</u>
	<u>No.</u>	<u>%</u>		<u>No.</u>	<u>%</u>		<u>No.</u>	<u>%</u>	
1968-69	2510	62.7%	1491	—	—	—	—	—	—
1969-70	2477	65.9%	1282	—	—	—	—	—	—
Proposed									
1970-71	2404	65.6%	1260	566	51.1%	541	1838	71.8%	719

[Source: pp. 68a, 74a, 75a]

The district court made its injunction permanent (63a-79a). The court concluded that the City's budget did propose a superior educational system, and that defendants were pursuing mixed motives—including racial motives—but that the "establishment of separate systems would plainly cause a *substantial* shift in the racial balance" (emphasis supplied) (74A):

... The two schools in the city, formerly all-white schools, would have about a 50-50 racial makeup, while the formerly all-Negro schools located in the county which, under the city's plan, would constitute the county system, would overall have about three Negro students to each white. As mentioned before, the city anticipates as well that a number of students would return to a city system from private schools. These may be assumed to be white, and such returnees would accentuate the shift in proportions.

The district court concluded that the operation of separate school systems would have serious adverse impact on the provision of plaintiffs' constitutional rights, and therefore enjoined creation of the new unit (78a):

... The inevitable consequence of the withdrawal of the city from the existing system would be a sub-

stantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools. The county officials, according to testimony which they have permitted to stand un rebutted, do not embrace the court-ordered unitary plan with enthusiasm. If secession occurs now, some 1,888 Negro county residents must look to this system alone for their education, while it may be anticipated that the proportion of whites in county schools may drop as those who can register in private academies. This Court is most concerned about the possible adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs. This is not to say that the division of existing school administration areas, while under desegregation decree, is impermissible. But this Court must withhold approval "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system," *Monroe v. Board of Commissioners, supra*, 459. As a court of equity charged with the duty of continuing jurisdiction to the end that there is achieved a successful dismantling of a legally imposed dual system, this Court cannot approve the proposed change.

The majority of the Court of Appeals, apparently concerned that the district court had not sufficiently recognized "the legitimate state interest of providing quality education for the state's children" (3a), articulated a different test:

If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts

should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative duty to end state supported school segregation. The test is much easier to state than it is to apply.

The majority concluded that the proposed "Emporia city unit" would not be an [all-]white island in an otherwise heavily black county" because "[r]egardless of whether the city students attend a separate school system, there will be a substantial majority of black students *in the county system*" (emphasis supplied); thus, "the effect of separation [does] not demonstrate that the primary purpose of the separation was to perpetuate segregation" (5a-6a). Since the district court had made no explicit "finding of discriminatory purpose," and because the school district officials advanced non-racial motives for the creation of a separate district, therefore, the majority of the Court of Appeals held that "the district court's injunction against the operation of a separate school district for the City of Emporia was improvidently entered and unnecessarily sacrifices legitimate and benign educational improvement" (8a).

The dissenting judges (Sobeloff and Winter, JJ) disagreed with both the formulation and application of the majority's rule:

[The majority] directs District Courts to weigh and assess the various purposes that may have moved the proponents of the new school district, with the objective of determining which purpose is dominant. District Courts are told to intercede *only* if they find that racial considerations were the *primary* purpose in the creation of the new school units. I find no prece-

dent for this test and it is neither broad enough nor rigorous enough to fulfill the Constitution's mandate. [11a-12a]

If challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding legitimate state interest is demonstrated. [12a]

If, as the majority directs, federal courts in this circuit are to speculate about the interplay and the relative influence of divers motives in the molding of separate school districts out of an existing district, they will be trapped in a quagmire of litigation. . . . Whites in counties heavily populated by blacks will be encouraged to set up, under one guise or another, independent school districts in areas that are or can be made predominantly white. [24a]

. . . I think the advocates of such a subdivision [of an existing district] bear the "heavy burden" of persuasion referred to in *Green* because, as in that case, the dominant feature of these cases is the last-minute proposal of an alternative to an existing and workable integration plan. [27a]

The record amply supports the conclusion that the creation of a new school district for the City of Emporia would, in terms of implementing the principles of *Brown*, be "less effective" than the existing "pairing" plan for the county system. [29a]

. . . I disagree that injunctive relief should be granted only when racial motivation was the "primary" motive for the creation of the new district. Consistent with *Green*, we should adopt the test urged by the government in *Scotland Neck*, i.e., to view the results of the severance as if it were a part of a desegregation plan for the original system. . . . By this test the injunction would stand in the *Littleton-Lake Gaston* case, as well

as in each of the two other cases, because in each of the three there is at least some racial motivation for the separation and some not insubstantial alteration of racial ratios, some inherent delay in achieving an immediate unitary system in all of the component parts, and an absence of compelling justification for what is sought to be accomplished. [36a]

REASONS FOR GRANTING THE WRIT

I

This Case Presents Federal Constitutional Issues of Critical Significance in the Process of School Desegregation.

This case arises out of the repeated failure of the County School Board of Greenville County to propose an acceptable desegregation plan (64a-65a). Acting pursuant to the mandates of *Brown v. Board of Educ.*, 349 U.S. 294 (1955) and subsequent decisions of this Court, the federal district court ordered that all of the County's schools be paired in order to provide a unitary, nonracial education for all students. Immediately thereafter, and without first seeking the permission of the district court, the City of Emporia undertook to establish a separate school system for its residents, which would have had the effect of creating an independent school division of substantially different racial composition from the County unit.

On plaintiffs' motion for injunctive relief, the district court considered Emporia's claims that a separate system would enable it to provide a "quality education" for its students, but concluded that maintenance of the County district structure and implementation of the pairing order would best accomplish the required desegregation. Accordingly, the district court enjoined the secession.

The Court of Appeals severely limited the district court's power to protect its desegregation decree, by confining the authority to prevent carving out of new districts to situations in which "the primary purpose for creating a new school district is to retain as much of separation of the races as possible." The potential impact of the decision upon "implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race," *Swann, supra*, slip op. at pp. 8-9—an impact perceived by the majority below, exemplified by the three cases before the Court of Appeals, and reflected in the increasing number of lawsuits involving similar issues—makes review by this Court particularly appropriate.

Both the majority and dissenting opinions below recognize the "serious danger that the creation of new school districts may prove to be yet another method to obstruct the transition from racially separated school systems to school systems in which no child is denied the right to attend a school on the basis of race" (3a). This Court has consistently accepted for review cases involving various devices or techniques which had the effect of avoiding full implementation of the *Brown* mandate.⁷ This is clearly such a case.⁸

⁷ *E.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958) (direct State interference); *Goss v. Board of Educ. of Knoxville*, 373 U.S. 683 (1963) (minority-to-majority transfers); *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964) (school closings); *Rogers v. Paul*, 382 U.S. 198 (1965) (faculty segregation hindering free choice); *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968) (free choice plans); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) (delay); *Northcross v. Board of Educ. of Memphis*, 397 U.S. 232 (1970) (exception for large cities); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra* ("neighborhood schools").

⁸ The Solicitor General of the United States also views the issue as important. See Petition for Writ of Certiorari, *United States v. Scotland Neck City Bd. of Educ.*, No. 1614, O.T. 1970.

The circumstances surrounding the movement for separate school districts in the three cases decided by the Court of Appeals suggest an inclination to utilize new school systems to avoid desegregation requirements. The cases are all from contiguous counties,⁹ each of which is majority black. Efforts to create separate city school districts were initiated within a very short period of time: March, 1969 (Halifax County), April, 1969 (Warren County), and July, 1969 (Greensville County). Although the Court of Appeals found in only one of the cases that "the primary purpose . . . was to carve out a refuge for white students and preserve to the extent possible segregated schools" (62a), the coincidence of dates and similarity of strategy suggests that this motive was not limited in occurrence, influence or effect to Warren County, North Carolina, alone.

Equally indicative of the gravity of the issue here presented are the numerous similar suits pending in or decided by lower courts.¹⁰

The rule adopted by the majority below provides, in the context of the federal courts' responsibility for the effective enforcement of the Fourteenth Amendment, that the constitutionality of changes in school district organization and attendance patterns shall depend upon examination of the motives of those supporting the changes. If a district court concludes the primary motive was to preserve as much segregation as possible, it may enjoin formation of

⁹ Warren County, North Carolina abuts Halifax County, North Carolina on the east; a portion of Halifax County is contiguous on the north with Greensville County, Virginia.

¹⁰ E.g., *Burleson v. County Bd. of Election Comm'rs of Jefferson County*, 308 F. Supp. 352 (E.D. Ark.), *aff'd per curiam*, 432 F.2d 1356 (8th Cir. 1970); *Aytch v. Mitchell*, Civ. No. PB-70-C-127 (E.D. Ark., Jan. 15, 1971); *Stout v. Jefferson County Bd. of Educ.*, 5th Cir. No. 30387; *Lee and United States v. Calhoun County Bd. of Educ.*, 5th Cir. No. 30154; *Jenkins v. Township of Morris School Dist.*, N.J. Supreme Court No. 7777.

a new unit; if, as in this case, the lower court finds both racial and non-racial motivations, it must permit the secession in spite of any disadvantageous effects upon desegregation of the schools.

- The majority opinion itself recognizes the difficulty attendant to the application of this standard (3a); the dissenters trenchantly predict it will trap the district courts in a "quagmire of litigation" "to speculate about the interplay and the relative influence of divers motives' . . ." (24a). We need not here belabor the point, well made by the Solicitor General to this Court,¹¹ that so subjective a standard ill serves the goal of attaining equal educational opportunity. It is worth repeating, though, what this Court recently said about the matter: "The measure of any desegregation plan is its effectiveness." *Davis v. Board of School Comm'ts of Mobile County*, No. 436, O.T. 1970, slip op. at p. 4.

By focusing upon intent, rather than effect, the standard enunciated below not only departs from this Court's holdings in school desegregation cases (see II below), but also from the general notion that the government must show compelling justification for actions which are based upon or result in racial differences.¹² The Court of Appeals' concern with intent is reminiscent of the time when "good faith," rather than results, was considered sufficient compliance with the State's obligation to desegregate. But,

The good faith of a school board in acting to desegregate its schools is a necessary concomitant to the

¹¹ See *Petition for Writ of Certiorari, United States v. Scotland Neck City Bd. of Educ.*, No. 1614, O.T. 1970.

¹² E.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (per Mr. Justice Clark), cert. denied, No. 1319, O.T. 1970 (April 5, 1971); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971); *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1969).

achievement of a unitary school system, but it is not itself the yardstick of effectiveness.

Hall v. St. Helena Parish School Bd., 417 F.2d 801, 807 (5th Cir.), cert. denied, 396 U.S. 904 (1969).

These problems are accentuated by the Fourth Circuit's application of the test it proposes,¹³ as the dissenting judges cogently argue. For example, the majority minimizes the shift in racial composition effected by the new districting, by comparing only the black student percentages in the county system before and after creation of a new district (6a), but fails to observe that the city unit, operating in the schools formerly attended by all the white children in

¹³ Even if the standard were correct, the Court of Appeals should have left its application to the district courts (which are more familiar with the facts and circumstances, and can weigh the credibility and demeanor of witnesses) rather than making its own judgment based on the record of proceedings. Cf. *Keyes v. School Dist. No. 1, Denver*, 396 U.S. 1215 (1969) (Mr. Justice Brennan, in Chambers); *Northcross v. Board of Educ. of Memphis*, 397 U.S. 232 (1970).

This is particularly relevant in this case. For example, one of the factors relied upon by the majority below was that

Emporia's position, referred to by the district court as "uncontradicted," was that effective integration of the schools in the whole County would require increased expenditures in order to preserve educational quality, that the county officials were unwilling to provide the necessary funds, and that therefore the city would accept the burden of educating city children.

(7a). Compare the finding of the district court (76a):

... The city's evidence, uncontradicted, was to the effect that the board of supervisors, in their opinion, would not be willing to provide the necessary funds.

While it is unfortunate that the County chose to take no position on the instant issue, the Court recognizes the City's evidence in this regard to be conclusions; and without in any way impugning the sincerity of the respective witnesses' conclusions, this Court is not willing to accept these conclusions as factual simply because they stand uncontradicted. . . . [emphasis supplied]

the consolidated district, would have a substantially lower percentage of black students (*compare* the district court's opinion; 74a).¹⁴ Furthermore, in this case and in *Scotland Neck*, the majority excluded from consideration the number of white students who could have attended city schools pursuant to the transfer provisions which initially accompanied the plans for separate districts, but it took account of such proposed transfers in concluding that an injunction was proper in the *Warren County* case. Again, in *Warren County* the majority probed deeply into the legislative history of the North Carolina special act creating the Littleton-Lake Gaston district, but in this case relies upon "the unusual nature of the organization of city and county governments in Virginia" (7a) as a justification for Emporia's desire to operate a separate school system without examining the relevant Virginia statutes governing the relationship between Emporia and the County school system (see

¹⁴ The following table shows the racial composition of the traditionally white schools in the City of Emporia:

TABLE 2—COMPARISON OF STUDENT ENROLLMENTS

	Greensville County High		Emporia Elementary			
	No. Black Students	% Black Students	No. White Students	No. Black Students	% Black Students	No. White Students
1967-68	50	6.5%	719	46	5.1%	857
1968-69	45	5.9%	720	53	6.4%	283
1969-70	424	55.1%	346	665	69.9%	283
Proposed 1970-71*	252	48.2%	271	314	53.8%	270

* The remaining County schools were projected to enroll the following percentages of black students: 73.7%, 68.9%, 76.5%, 72.5%, and 69.4%.

[Sources: 64a, 67a-68a, 74a-75a]

86a-98a).¹⁵ Three judges of the Court of Appeals could find no distinction between the cases to justify the different results reached by the majority.

In sum, the district court measured the new district proposal in the same straightforward fashion as any desegregation plan which might be presented to it,¹⁶ selecting that plan which (adopting this Court's phrasing) achieved "the greatest possible degree of actual desegregation," *Swann, supra*, slip op. at 22. The Court of Appeals reversed the priorities, holding that district courts should not interfere with the carving up of desegregating school systems, even if desegregation is thereby impeded, unless the motive is to maintain the greatest possible degree of *segregation*. That new test seriously jeopardizes continued progress toward school desegregation in every jurisdiction and so compels the granting of review by this Court.

¹⁵ Where a school division is comprised of a county and a city, the two school boards must meet jointly to select the superintendent. Va. Code Ann. §22-34(87a). When a City contracts with a County for the education of city students, Va. Code Ann. §22-99 (96a) requires that the County School Board shall include city representatives. By agreement, the City and County Boards may operate joint schools, Va. Code Ann. §22-7 (86a) or, with the consent of the two jurisdictions' governing bodies, may establish a single division school board. Va. Code Ann. §§22-100.1 *et seq.* (97a-98a). Thus, Virginia law affords cities several alternatives to operating their own schools.

At the time of the preliminary hearing in this case, two of the four members of the County School Board were residents of the City of Emporia (Transcript of Hearing, August 8, 1969, pp. 182-83).

¹⁶ Cf. *Perkins v. Mathews*, 400 U.S. 379 (1971); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

II

The Decision Below Is In Conflict With Rulings Of This Court and The Ruling of Another Court of Appeals.

In *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968), this Court mandated federal district courts to judge proposed school desegregation plans by their efficacy, and to select that plan which offers to bring about the greatest amount of desegregation unless a school board demonstrates very compelling reasons for preferring another plan:

Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith; and at the least it places a *heavy burden* upon the board to explain its preference for an apparently less effective method.

391 U.S. at 439 (emphasis supplied). Recently, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, No. 281, O.T. 1970, this Court reemphasized the proposition that the adequacy of a desegregation plan is to be tested by its results.

In this case, the district court correctly performed its *Green* obligation. It rejected Emporia's effort to establish a separate school system because it found such separation would detract from, rather than enhance, desegregation. However, the Court of Appeals held *Green* inapplicable because the new lines proposed were school district lines, rather than school attendance area lines. Instead, the Court of Appeals established a test which places the burden upon the plaintiffs—not the school board, as in *Green*—to demonstrate that the primary motivation of those who seek to operate a separate system is to maintain segregation. Although the district court found that separation would estab-

lish two school systems with substantially differing racial compositions, and would operate only to hinder, not further, the process of desegregation, still the Court of Appeals reversed because there was no finding of primary motivation.

Such a rule is clearly at odds with that stated in *Green* and applied by the district court whose decision was affirmed in *Swann*. See the dissenting opinion of Judge Winter, below, 26a-32a.

The decision below also conflicts directly with that of the Eighth Circuit Court of Appeals, which considered the same issue but reached a contrary result.

In *Burleson v. County Bd. of Election Comm'rs of Jefferson County*, 308 F. Supp. 352 (E.D. Ark.), *aff'd per curiam*, 432 F.2d 1356 (8th Cir. 1970), the small, white Hardin area, formerly a separate school district noncontiguous to the Dollarway school district, joined Dollarway in 1949 when its school facilities were destroyed by fire. In 1969 (following the issuance of decrees requiring effective desegregation of the Dollarway district, *see Cato v. Parham*, 302 F. Supp. 129 (E.D. Ark. 1969)), petitions were circulated among Hardin residents which sought the re-separation of the area from Dollarway. The Arkansas court enjoined the secession because it concluded that loss of the Hardin area would frustrate, and render increasingly difficult, execution of its own desegregation decrees. Findings with regard to motivation were not made nor were they considered necessary:

Much of the evidence at the trial was directed at the motive of the proponents of secession. Plaintiffs undertook to prove that the basic motivation was a desire to avoid an integrated school situation; the intervenors undertook to show that integration was not a factor in the equation.

While the Court is satisfied that a desire to escape the impact of the Court's decree was not the sole motive for the circulation of the election petitions and was not the sole factor taken into consideration by Hardin residents who voted for secession, the Court is also convinced and finds that the belief or hope of the Area residents that by seceding from Dollarway they could keep their children out of integrated schools or at least would be able to send them to districts having a smaller Negro population than Dollarway was a powerful selling point for the measure in the Area. . . .

The Court finds from uncontradicted evidence that the secession of the Area would inflict severe damage upon the District financially. . . . The Court further finds that the secession, if permitted, will substantially increase the racial imbalance in the District's student bodies. . . .

The Area residents do not want to move out of the District; they want to move the District and its problems away from themselves. The Court does not think that they can be permitted to avoid the supposed benefits or escape the supposed burdens of the Dollarway litigation so easily, or that in the existing circumstances a majority of the residents of the Area can deprive other residents of their present right to attend fully integrated schools at Dollarway.

No resident of the Area is required to remain there. No resident of the Area is required to send his children to the District's schools. But at this time the residents of the Area as a class cannot be permitted while remaining where they are to use the State's laws and procedures to take the Area out of the District.

Thus, in *Burleson*, the district court recognized, as did the district court in this case, that motives were mixed; that some residents might favor dissolution for different reasons, including some for racial reasons. The court's major concern was the impact upon its own decrees, which it found would be considerable. The Court of Appeals for the Eighth Circuit affirmed summarily upon the district court's opinion. 432 F.2d-1356.

The *Burleson* decision depends upon and encourages the responsible exercise of a district court's powers. Contrariwise, the opinion below strips the lower courts of their ability to protect their decrees and to effectuate desegregation. On the choice between these conflicting rules may rest the future course of much school desegregation.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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Opinions of Court of Appeals

United States Court of Appeals for the Fourth Circuit

No. 14552

PECOLA ANNETTE WRIGHT, ET AL., APPELLEES

v.

**COUNCIL OF THE CITY OF EMPORIA AND THE MEMBERS
THEREOF, AND SCHOOL BOARD OF THE CITY OF EMPORIA
AND THE MEMBERS THEREOF, APPELLANTS**

**Appeal from the United States District Court for the
Eastern District of Virginia, at Richmond**

ROBERT R. MERHIGE, JR., District Judge

Argued October 8, 1970—Decided March 23, 1971

**Before HAYNSWORTH, Chief Judge, BOREMAN, BRYAN,
WINTER, and CRAVEN, Circuit Judges sitting en
banc***

**John F. Kay, Jr., and D. Dortch Warriner (War-
riner, Outten, Slagle & Barrett; and Mays, Valentine,
Davenport & Moore on brief) for Appellants, and S.
W. Tucker (Henry L. Marsh, III, and Hill, Tucker
& Marsh; and Jack Greenberg, James M. Nabrit, III,
and Norman Chachkin on brief) for Appellees.**

CRAVEN, Circuit Judge: In this case and two
others now under submission en banc we must deter-
mine the extent of the power of state government to

*Judge Sobeloff did not participate. Judge Butzner disqualified himself because he participated as a district judge in an earlier stage of this case.

redesign the geographic boundaries of school districts.¹ Ordinarily, it would seem to be plenary but in school districts with a history of racial segregation enforced through state action, close scrutiny is required to assure there has not been gerrymandering for the purpose of perpetuating invidious discrimination.

Each of these cases involve a county school district in which there is a substantial majority of black students out of which was carved a new school district comprised of a city or a city plus an area surrounding the city. In each case, the resident students of the new city unit are approximately 50 percent black and 50 percent white. In each case, the district court enjoined the establishment of the new school district. In this case, we reverse.

I

If legislation creating a new school district produces a shift in the racial balance which is great enough to support an inference that the purpose of the legislation is to perpetuate segregation, and the district judge draws the inference, the enactment falls under the Fourteenth Amendment and the establishment of such a new school district must be enjoined. See *Gomillion v. Lightfoot*, 364 U.S. 399 (1960). Cf. *Haney v. County Board of Education of Sevier County*, 410 F. 2d 920 (8th Cir. 1969); *Burleson v. County Board of Election Commissioners of Jefferson County*, 368 F. Supp. 352 (E.D. Ark.) aff'd — F. 2d —, No. 20228 (8th Cir. Nov. 18, 1970). But where the shift is merely a modification of the racial ratio rather than effective resegregation the problem becomes more difficult.

¹ The other two cases are *United States v. Scotland Neck City Board of Education*, — F. 2d —, Nos. 14929 and 14930 (4th Cir. —, 1971) and *Turner v. Littleton-Lake Gaston School District*, — F. 2d —, No. 14990 (4th Cir. —, 1971).

The creation of new school districts may be desirable and/or necessary to promote the legitimate state interest of providing quality education for the state's children. The refusal to allow the creation of any new school districts where there is any change in the racial makeup of the school districts could seriously impair the state's ability to achieve this goal. At the same time, the history of school integration is replete with numerous examples of actions by state officials to impede the mandate of *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*). There is serious danger that the creation of new school districts may prove to be yet another method to obstruct the transition from racially separated school systems to school systems in which no child is denied the right to attend a school on the basis of race. Determining into which of these two categories a particular case fits requires a careful analysis of the facts of each case to discern the dominant purpose of boundary realignment. If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation. The test is much easier to state than it is to apply.

II

Emporia became a city of the so-called, second class on July 31, 1967, pursuant to a statutory procedure established at least as early as 1892. See 3 Va. Code § 15.1-978 to -998 (1950); Acts of the Assembly 1891-92, ch. 595. Prior to that time it was an incorporated

town and as such was part of Greenville County. At the time city status was attained Greenville County was operating public schools under a freedom of choice plan approved by the district court, and *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), invalidating freedom of choice unless it "worked," could not have been anticipated by Emporia, and indeed, was not envisioned by this court. *Bowman v. County School Board of Charles City County*, 382 F. 2d 326 (4th Cir. 1967). The record does not suggest that Emporia chose to become a city in order to prevent or diminish integration. Instead, the motivation appears to have been an unfair allocation of tax revenues by county officials.

One of the duties imposed on Emporia by the Virginia statutes as a city of the second class was to establish a school board to supervise the public education of the city's children. Under the Virginia statutes, Emporia had the option of operating its own school system or to work out one of a number of alternatives under which its children would continue to attend school jointly with the county children. Emporia considered operating a separate school system but decided it would not be practical to do so immediately at the time of its independence. There was an effort to work out some form of joint operation with the Greenville County schools in which decision making power would be shared. The county refused. Emporia finally signed a contract with the county on April 10, 1968, under which the city school children would attend schools operated by the Greenville County School Board in exchange for a percentage of the school system's operating cost. Emporia agreed to this form of operation only when given an ultimatum by the county in March 1968 that it would stop educating the city children mid-term unless some agreement was reached.

At the same time that the county was engaged in its controversy with Emporia about the means of educating the city children, the county was also engaged in a controversy over the elimination of racial segregation in the county schools. Until sometime in 1968, Greenville County operated under a freedom of choice plan. At that time the plaintiffs in this action successfully urged upon the district court that the freedom of choice plan did not operate to disestablish the previously existing dual school system and thus was inadequate under *Green v. County School Board of New Kent County, supra*. After considering various alternatives, the district court, in an order dated June 25, 1969, paired all the schools in Greenville County.

Also in June 1969, Emporia was notified for the first time by counsel that in all probability its contract with the county for the education of the city children was void under state law. The city then filed an action in the state courts to have the contract declared void and notified the county that it was ending its contractual relationship forthwith. Parents of city school children were notified that their children would attend a city school system. On August 1, 1969, the plaintiffs filed a supplemental complaint seeking an injunction against the City Council and the City School Board to prevent the establishment of a separate school district. A preliminary injunction against the operation of a separate system was issued on August 8, 1969. The temporary injunction was made permanent on March 3, 1969.²

The Emporia city unit would not be a white island in an otherwise heavily black county. In fact, even in

²The decision of the court below is reported as *Wright v. County School Board of Greenville County*, 309 F. Supp. 671 (E.D. Va. 1970).

Emporia there will be a majority of black students in the public schools, 52 percent black to 48 percent white. Under the plan presented by Emporia to the district court, all of the students living within the city boundaries would attend a single high school and a single grade school. At the high school there would be a slight white majority, 48 percent black and 52 percent white, while in the grade school there would be a slight black majority, 54 percent black and 46 percent white. The city limits of Emporia provide a natural geographic boundary for a school district.

The student population of the Greensville County School District without the separation of the city unit is 66 percent black and 34 percent white. The students remaining in the geographic jurisdiction of the county unit after the separation would be 72 percent black and 28 percent white. Thus, the separation of the Emporia students would create a shift of the racial balance in the remaining county unit of 6 percent. Regardless of whether the city students attend a separate school system, there will be a substantial majority of black students in the county system.

Not only does the effect of the separation not demonstrate that the primary purpose of the separation was to perpetuate segregation, but there is strong evidence to the contrary. Indeed, the district court found that Emporia officials had other purposes in mind. Emporia hired Dr. Neil H. Tracey, a professor of education at the University of North Carolina, to evaluate the plan adopted by the district court for Greensville County and compare it with Emporia's proposal for its own school system. Dr. Tracey said his studies were made with the understanding that it was not the intent of the city to resegregate. He testified that the plan adopted for Greensville County would require additional expenditures for transpor-

tation and that an examination of the proposed budget for the Greenville County Schools indicated that not only would the additional expenditures not be forthcoming but that the budget increase over the previous year would not even keep up with increased costs due to inflation. Emporia on the other hand proposed increased revenues to increase the quality of education for its students and in Dr. Tracey's opinion the proposed Emporia system would be educationally superior to the Greenville system. Emporia proposed lower student teacher ratios, increased per pupil expenditures, health services, adult education, and the addition of a kindergarten program.

In sum, Emporia's position, referred to by the district court as "uncontradicted," was that effective integration of the schools in the whole county would require increased expenditures in order to preserve education quality, that the county officials were unwilling to provide the necessary funds, and that therefore the city would accept the burden of educating the city children. In this context, it is important to note the unusual nature of the organization of city and county governments in Virginia. Cities and counties are completely independent, both politically and geographically. See *City of Richmond v. County Board*, 199 Va. 679, 684 (1958); *Murray v. Roanoke*, 192 Va. 321, 324 (1951). When Emporia was a town, it was politically part of the county and the people of Emporia were able to elect representatives to the county board of supervisors. When Emporia became a city, it was completely separated from the county and no longer has any representation on the county board. In order for Emporia to achieve an increase in school expenditures for city schools it would have to obtain the approval of the Greenville County Board of

Supervisors whose constituents do not include city residents.

Determining what is desirable or necessary in terms of funding for quality education is the responsibility of state and school district officers and is not for our determination. The question that the federal courts must decide is, rather, what is the primary purpose of the proposed action of the state officials. See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969). Is the primary purpose a benign one or is the claimed benign purpose merely a cover-up for racial discrimination? The district court must, of course, consider evidence about the need for and efficacy of the proposed action to determine the good faith of the state officials' claim of benign purpose. In this case, the court did so and found explicitly that "[t]he city clearly contemplates a superior quality education program. It is anticipated that the cost will be such as to require higher tax payments by city residents." 309 F. Supp. at 674. Notably, there was no finding of discriminatory purpose, and instead the court noted its satisfaction that the city would, if permitted, operate its own system on a unitary basis.

We think the district court's injunction against the operation of a separate school district for the City of Emporia was improvidently entered and unnecessarily sacrifices legitimate and benign educational improvement. In his commendable concern to prevent resegregation—under whatever guise—the district judge momentarily overlooked, we think, his broad discretion in approving equitable remedies and the practical flexibility recommended by *Brown II* in reconciling public and private needs. We reverse the judgment of the district court and remand with instructions to dissolve the injunction.

Because of the possibility that Emporia might institute a plan for transferring students into the city system from the county system resulting in resegregation,³ or that the hiring of teachers to serve the Emporia school system might result in segregated faculties, the district court is directed to retain jurisdiction.

Reversed and remanded.

SOBELOFF, *Senior Circuit Judge*, with whom WINTER, *Circuit Judge*, joins, dissenting and concurring specially: In respect to Nos. 14929 and 14930, *United States v. Scotland Neck City Board of Education*, — F. 2d — (4th Cir. 1971), and No. 14990, *Turner v. Littleton-Lake Gaston School District*, — F. 2d — (4th Cir. 1971), the two cases in which I participated, I dissent from the court's reversal in *Scotland Neck* and concur in its affirmance in *Littleton-Lake Gaston*. I would affirm the District Court in each of those cases. I join in Judge Winter's opinion, and since he has treated the facts analytically and in detail, I find it unnecessary to repeat them except as required in the course of discussion. Not having participated in No. 14552, *Wright v. Council of City of Emporia*, — F. 2d — (4th Cir. 1971), I do not vote on that appeal, although the views set forth below necessarily reflect on that decision as well, since the principles enunciated by the majority in that case are held to govern the legal issue common to all three of these school cases.

³ A notice of August 31, 1969, invited applications from the county. Subsequently, the city assured the district court it would not entertain such applications without court permission.

I

The history of the evasive tactics pursued by white communities to avoid the mandate of *Brown v. Board of Education*, 349 U.S. 294 (1955), is well documented. These have ranged from outright nullification by means of massive resistance laws¹ and open and occasionally violent defiance,² through discretionary pupil assignment laws³ and public tuition grants in support of private segregated schools,⁴ to token integration plans parading under the banner "freedom-

¹ See *Duckworth v. James*, 267 F. 2d 224 (4th Cir. 1959); *Bush v. Orleans Parish School Bd.*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569 (1961); *Bush v. Orleans Parish School Bd.*, 187 F. Supp. 42 (E.D. La. 1960), *aff'd Per curiam*, 365 U.S. 569 (1961); *Aaron v. McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959); *aff'd sub nom., Faubus v. Aaron*, 361 U.S. 197 (1959); *James v. Almond*, 170 F. Supp. 331 (E.D. Va. 1959), *app. dis.*, 359 U.S. 1006 (1959); *Harrison v. Day*, 200 Va. 439, 106 S.E. 2d 636 (1959) (decided the same day as *James v. Almond*, *supra*).

² See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Armstrong v. Board of Education of City of Birmingham, Ala.*, 323 F. 2d 333 (5th Cir. 1963), *cert. denied sub nom., Gibson v. Harris*, 376 U.S. 908 (1964); *Brewer v. Hoxie School District No. 46*, 238 F. 2d 91 (8th Cir. 1956); *Holmes v. Danner*, 191 F. Supp. 39 (M.D. Ga. 1961), *stay denied*, 364 U.S. 939 (1961).

³ See *Northcross v. Board of Education of City of Memphis*, 302 F. 2d 818 (6th Cir. 1962); *Manning v. Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960); *Gibson v. Board of Public Instruction, Dade County, Fla.*, 272 F. 2d 763 (5th Cir. 1959); *Orleans Parish School Board v. Bush*, 242 F. 2d 156 (5th Cir. 1957); *United States Commission on Civil Rights, Civil Rights USA—Public Schools, Southern States*, 2-17 (1962).

⁴ See *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961, *aff'd*, 368 U.S. 515 (1962)).

of-choice.”⁵ One by one these devices have been condemned by the Supreme Court:

[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted “ingeniously or ingenuously.” *Cooper v. Aaron*. 358 U.S. 1, 17 (1958).

Neither these agencies, nor school boards, nor local communities have the right to put roadblocks in the way of effective integration. The Court has declared that “the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter ‘only unitary schools.’” *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

Today, I fear, we behold the emergence of a further stratagem—the carving out of new school districts in order to achieve racial compositions more acceptable to the white community. The majority frankly acknowledges the “serious danger that the creation of new school districts may prove to be yet another method to obstruct the transition from racially separate school systems to school systems in which no child is denied the right to attend a school on the basis of race,” *Emporia, supra* at 4. However, the court fashions a new and entirely inappropriate doctrine to avert that danger. It directs District Courts to weigh and assess the various purposes that may have moved

⁵ See *Green v. County School Board*, 391 U.S. 430. (1968); *Raney v. Board of Education*, 391 U.S. 443 (1968); *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968).

the proponents of the new school district, with the objective of determining which purpose is dominant. District Courts are told to intercede *only* if they find that racial considerations were the *primary* purpose in the creation of the new school units.⁶ I find no precedent for this test and it is neither broad enough, nor rigorous enough to fulfill the Constitution's mandate. Moreover, it cannot succeed in attaining even its intended reach, since resistant white enclaves will quickly learn how to structure a proper record—shrill with protestations of good intent, all consideration of racial factors muted beyond the range of the court's ears.⁷

If challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding legitimate state interest is demonstrated. This test is more easily applied, more fully implements the prohibition of the Fourteenth Amendment and has already gained firm root in the law. The Supreme Court has explicitly applied this test to state criminal statutes which on their face establish racial classifications. In 1964, striking down a Florida criminal statute which forbade a man and woman of different races to "habitually live in and occupy in the nighttime the same room," the Court stated in an opinion written by Justice White:

⁶ The majority's test as stated in *Emporia, supra*, is as follows: "Is the primary purpose a benign one or is the claimed benign purpose merely a cover-up for racial discrimination?"

⁷ The impracticability of the majority's test is highlighted by the dilemma in which the District Judges found themselves in *Scotland Neck*: "In ascertaining such a subjective factor as motivation and intent, it is of course impossible for this Court to accurately state what proportion each of the above reasons played in the minds of the proponents of the bill, the legislators or the voters of Scotland Neck * * *. *United States v. Halifax County Board of Education*, 314 F. Supp. 65, 72 (E.D.N.C. 1970)."

Normally, the widest discretion is allowed the legislative judgment * * * ; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. [Citations] But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499; and subject to the most "rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States*, 320 U.S. 810, 100.

McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964). Thus, the Court held that the proper test to apply in that case was "whether there *clearly appears* in the relevant materials some *overriding* statutory purpose *requiring* the proscription of the specified conduct when engaged in by a white and a Negro, but not otherwise." *Id.* at 192 [emphasis added]. To the further argument that the Florida statute should be upheld because ancillary to and serving the same purpose as an anti-miscegenation statute presumed valid for the purpose of the case, the Court replied:

There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is

necessary, and not merely rationally related, to the accomplishment of a permissible state policy. *Id.* at 196 [emphasis added].

There were no dissents in the *McLaughlin* case. The two concurring opinions serve to underline and buttress the test applied by the majority. Justice Harlan, joining the Court's opinion, added:

I agree with the Court * * * that necessity, not mere reasonable relationship, is the proper test, see *ante*, pp. 195-196. *NAACP v. Alabama*, 377 U.S. 288, 307-308; *Saia v. New York*, 334 U.S. 558, 562; *Martin v. Struthers*, 319 U.S. 141, 147; *Thornhill v. Alabama*, 310 U.S. 88, 96; *Schneider v. State*, 308 U.S. 147, 161, 162; 164; see *McGowan v. Maryland*, 366 U.S. 420, 466-467 (Frankfurter, J., concurring).

The fact that these cases arose under the principles of the First Amendment does not make them inapplicable here. Principles of free speech are carried to the States only through the Fourteenth Amendment. The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the Fourteenth Amendment.

Id. at 197. Justice Stewart, speaking for himself and Justice Douglas, expressed the view that the majority's test did not go far enough as applied to a *criminal* statute because no overriding state purpose *could* exist.

* * * I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. * * * I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.

Id. at 198.

Three years later the Court dealt with a Virginia statute prohibiting interracial marriages. The statute was determined to be unconstitutional under the *McLaughlin* test, expressed here in these terms:

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. * * *

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.

Loving v. Virginia, 388 U.S. 1, 11 (1967) [emphasis added]. Justice Stewart filed a separate concurring opinion—reiterating his belief that there could never be a sufficiently compelling state purpose to justify a criminal statute based on racial classification. *Id.* at 13.

Although *McLaughlin* and *Loving* dealt with criminal statutes and express racial classifications, numerous lower court decisions apply the strict "compelling" or "overriding" purpose standard in the civil area as well as the criminal, and extend its application to facially neutral state action which, in reality, is racially discriminatory in its effect. The definitive case is *Jackson v. Godwin*, 400 F. 2d 529 (5th Cir. 1968), in which Judge Tuttle meticulously and exhaustively examines the lower court cases, including those "which have struck down rules and regulations which on their face appear to be non-discriminatory but which in practice and effect, if not purposeful design, impose a

heavy burden on Negroes and not on whites, and operate in a racially discriminatory manner." *Id.* at 538-39 [emphasis added]. He concludes his analysis with this formulation of the constitutional standard:

In both the areas of racial classification and discrimination and First Amendment freedoms, we have pointed out that stringent standards are to be applied to governmental restrictions in these areas, and rigid scrutiny must be brought to bear on the justifications for encroachments on such rights. The State must strongly show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement, [citations]; and in the absence of such compelling justification the state restrictions are impermissible infringements of these fundamental and preferred rights. *Id.* at 541.

The most recent application of the "compelling and overriding state interest" test is to be found in the Fifth Circuit's decision in *Hawkins v. Town of Shaw*, F. 2d (5th Cir. 1971). The plaintiffs, Negro residents of Shaw, Mississippi, alleged racial discrimination by town officials in the provision of various municipal services. The District Court dismissed the complaint, applying a test akin to that used by the majority in this case: "If actions of public officials are shown to have rested upon rational considerations, irrespective of race or poverty, they are not within the condemnation of the Fourteenth Amendment, and may not be properly condemned upon judicial review." *Hawkins v. Town of Shaw*, 303 F. Supp. 1162, 1168 (N.D. Miss. 1969). The Fifth Circuit reversed, pointing to the standard set forth in *Jackson v. Godwin*, *supra*, and stating, "In applying this test, defendants' actions may be justified only if they show a compel-

ling state interest." *Hawkins v. Town of Shaw*, F. 2d (5th Cir. 1971) (slip opinion at 3).

In *Hawkins* the Fifth Circuit specifically considered the relevance of the defendant's "intent," or "purpose" as the majority in our case would label it. Conceding that "the record contains no direct evidence aimed at establishing bad faith, ill-will or an evil motive on the part of the Town of Shaw and its public officials," *Id.* at (slip opinion at 12), the court held: "Having determined that no compelling state interests can possibly justify the discriminatory results of Shaw's administration of municipal services, we conclude that a violation of equal protection has occurred." *Id.* at (slip opinion at 13) [emphasis in original text].

Just as Shaw's administration of municipal services violates the constitutional guarantee of equal protection, so too does the creation of the new Scotland Neck School District.⁸ The challenged legislation carves an enclave, 57% white and 43% black, from a previously 22% white and 77% black school system.⁹ No compelling or overriding state interest justifies the new district, and its formation has a racially discriminatory effect by allowing the white residents of Scotland Neck to shift their children from a school district where they are part of a 22% minority to one where they constitute a 57% majority.

The prevailing opinion draws comfort from the fact that the new school district, because all children in the same grade will attend the same school, will be "integrated throughout." I dare say a 100% white

⁸ Since even the majority concedes that the Littleton-Lake Gaston School District must be enjoined as a racially discriminatory scheme in violation of the Fourteenth Amendment, I do not discuss the facts of that case.

⁹ One percent of the pupils in Halifax County are Indians.

school district would also be "integrated throughout." The relevant question is what *change* in degree of integration has been effected by the creation of the new district. Here the change is an increase in the percentage of white pupils from 22% to 57%. The Constitution will no more tolerate measures establishing a ratio of whites to blacks which the whites find *more* acceptable than it will measures totally segregating whites from blacks. The 35% shift here is no less discriminatory because it is a shift from 22% to 57% than if it were one from 65% to 100%.¹⁹

The majority opinion makes the puzzling concession that:

If the effect of this act was the continuance of a dual school system in Halifax County or the establishment of a dual system in Scotland Neck it would not withstand challenge under the equal protection clause, but we have concluded that it does not have that effect.

The situation here is that the Act sets up in Halifax County two school systems, one with a 50:43 white to black ratio and the other with a 19:80 white to black ratio, in place of one school system with a 22:77 white to black ratio. Thus, the Act constructs a dual school system in Halifax County by the simple expedient of labeling the two sets of schools as separate districts. The majority does not explain

¹⁹ Judge Winter properly emphasizes in his separate opinion that the effect of the new school districts must be measured by comparing "the racial balance in the preexisting unit with that in the new unit sought to be created, and that remaining in the preexisting unit after the new unit's creation." Focusing, as do I, on the 35% increase in the white student population of the new Scotland Neck School District, he quite correctly notes that "[a] more flagrant example of the creation of a white haven, or a more nearly white haven, would be difficult to imagine."

why the Act can *create* a dual school system in Halifax County if it could not *continue* a dual system there. Nor do they explain why the Act can *establish* a dual school system in Halifax County if it could not *establish* one in Scotland Neck. Obviously no explanation is possible and the legislation severing the Scotland Neck School District fails to meet the test of the equal protection clause.

II

Even if I accepted the majority's formulation as the proper doctrine to control these cases, which I certainly do not, I think their test is misapplied in *Scotland Neck*. The court accepts at face value the defendants' assertions that local control and increased taxation were the dominant objectives to be fulfilled by the new district, with the ultimate goal of providing quality education to the students of Scotland Neck. The facts plainly are to the contrary and demonstrate that, in projecting the new district, race was the primary consideration. The District Court specifically found that a significant factor in the creation of the new school district was

a desire on the part of the leaders of Scotland Neck to preserve a ratio of black to white students in the schools of Scotland Neck that would be acceptable to white parents and thereby prevent the flight of white students to the increasingly popular all-white private schools in the area.

United States v. Halifax County Board of Education, 314 F. Supp. 65, 72 (E.D.N.C. 1970). The defendants do not contest this finding.¹¹

¹¹ The defendants assert instead that the prevention of white flight is a legitimate goal. However, the Supreme Court in

What starkly exposes the true purpose impelling the redistricting adventure and belies the professions of lofty objectives is the transfer plan initially adopted by the Scotland Neck City Board of Education.¹² Under that plan, parents residing within Halifax County but outside the newly fashioned district could place their children in the Scotland Neck Schools by paying a fee ranging from \$100 to \$125. The use of transfer plans of this nature as devices to thwart the mandate of *Brown v. Board of Education, supra*, has not been uncommon,¹³ and the majority here has no difficulty in recognizing that the Scotland Neck transfer plan was a contrivance to perpetuate segregation. Initial applications for transfer under the plan were received from 350 white and only 10 black children in Halifax County. The net result would have been a racial mix of 74% white, 26% black in the Scotland Neck School District, contrasting with 82% black, 17% white, 1% Indian, in the rest of Halifax County.

Monroe v. Board of Commissioners, 391 U.S. 450, 459 (1968), has directly addressed itself to this argument, and rejected it out of hand: "We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, at 300.

See also *Brunson v. Board of Trustees of School District No. 1 of Clarendon County*, 429 F. 2d 820 (4th Cir. 1970); *Anthony v. Marshal County Board of Education*, 409 F. 2d 1287 (5th Cir. 1969). The defendants' candid admission serves only to emphasize the dominant racial considerations behind the whole scheme.

¹² Although the School Board later abandoned the transfer plan, its initial adoption nevertheless reflects the Board's intentions.

¹³ See *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968); *Gross v. Board of Education*, 373 U.S. 683 (1963).

Thus the transfer plan would have operated directly contrary to the obligation to desegregate the schools of Halifax County and distinctly evidences the design of the Scotland Neck School Board to bring into existence a white haven.

Curiously enough, despite its condemnation of the transfer plan, the court declares the plan not relevant in assessing the intent of the North Carolina legislature in enacting Chapter 31, since there is no evidence in the record to show that the legislative body knew a transfer plan would be effected. This reasoning is fallacious for legislators are not so naive and, in any event, are chargeable with the same motivations as the local communities concerned. The relevant inquiry under the majority's test is into the purposes for which state action was taken and, as Judge Winter observes in his separate opinion, when dealing with statutes designed to affect local communities, one must look to the localities to determine the purposes prompting the legislation.¹⁴

The size of the new school district in Scotland Neck is also a crucial factor to be taken into account in judging the genuineness of the alleged goal of quality education. The Report of the Governor's Study Commission on the Public School System of North Carolina favors the *consolidation* of school districts to increase efficiency in the operations of the public schools,

¹⁴ Moreover, as the District Court noted, local newspapers, including the *Raleigh News and Observer*, suggested that racial considerations, and not a concern for better educational, motivated the legislation. For example, on February 14, 1969, a month before Chapter 31 was enacted, the *Raleigh News and Observer* commented editorially that the bill provided for an "educational island" dominated by whites and on February 22, 1969, suggested that if the bill passed, it would encourage other school districts to resort to similar legislation.

and suggests 9,000–10,000 as a desirable pupil population, with 3,500 to 4,000 as a minimum. Scotland Neck's minuscule new school district for 695 pupils—one fifth of the suggested minimum—is an anomaly that runs directly counter to the recommendation of the Study Commission that schools be merged into larger administrative units. Moreover, if quality education were the true objective and Scotland Neck residents were deeply concerned with increasing revenue to improve their schools, one might have expected that in-depth consideration would have been given to the financial and educational implications of the new district. However, the District Court found that:

[t]here were no studies made prior to the introduction of the bill with respect to the educational advantages of the new district, and there was no actual planning as to how the supplement would be spent although some people assumed it would be spent on teachers' supplements.

United States v. Halifax County Board of Education, 314 F. Supp. at 74.

Also highly relevant in assessing the dominant purpose is the timing of the legislation splintering the Halifax County school system. During the 1967–68 school year the Halifax County School District maintained racially identifiable schools, and only 46 of the 875 students attending the Scotland Neck school were black. The next school year, under prodding by the Department of Justice, the Halifax County Board of Education assigned to the Scotland Neck school the entire seventh and eighth grades from an adjacent all-black county school, and promised to desegregate completely by 1969–70. A survey by the North Carolina State Department of Education in December 1968 recommended an integration plan which provided that

690 black and 325 white students should attend the Scotland Neck school. It was only then that the bill which later became Chapter 31 was introduced in the General Assembly of North Carolina in 1969. The fact that the Scotland Neck School District was not formed until the prospects for a unitary school system in Halifax County became imminent leads unmistakably to the conclusion that race was the dominant consideration and that the goal was to achieve a degree of racial apartheid more congenial to the white community.¹⁵

III

The court's incongruous holdings in these two cases, reversing the District Court in *Scotland Neck*, while affirming in the twin case, *Littleton-Lake Gaston*, cannot be reconciled. The uncontested statistics presented in *Scotland Neck* speak even louder in terms of race than the comparable figures for *Littleton-Lake Gaston*. The white community in Scotland Neck has sliced out a predominantly white school system from an overwhelmingly black school district. By contrast, the white community in Littleton-Lake Gaston was more restrained, gerrymandering a 46% white, 54% black, school unit from a county school system that was 27% white, 67% black.¹⁶ The majority attempts to escape the inevitable implications of these statistics by attributing to the North Carolina legislature, which severed the Scotland Neck School District on March 3, 1969, benevolent motivation and obliviousness to the

¹⁵ It is also noteworthy that while the Scotland Neck community claims that it had not been accorded a fair allocation of county school funds over a period of years, this apparently became intolerable only when the Department of Justice exerted pressure for immediate action to effectuate integration.

¹⁶ Six percent of the pupils in Warren County are Indian.

racial objectives of the local white community. Yet the majority unhesitatingly finds a discriminatory purpose in the similar excision of the new Littleton-Lake Gaston School District by the same legislators only one month later, on April 11, 1969. The earlier statute no less than the later provided a refuge for white students and maximized preservation of segregated schools. The record and the District Court's opinion in *Scotland Neck*, no less than the record and the opinion in *Littleton-Lake Gaston*, are replete with evidence of discriminatory motivations. On their facts the two cases are as alike as two peas in a pod.

Judge Bryan soundly recognizes the discordance in the two holdings of the majority. The resolution he proposes is to reverse in both cases. This would indeed cure the inconformity, but at the cost of compounding the error. The correction called for lies in the opposite direction—affirmance in both cases.

IV

If, as the majority directs, federal courts in this circuit are to speculate about the interplay and the relative influence of divers motives in the molding of separate school districts out of an existing district, they will be trapped in a quagmire of litigation. The doctrine formulated by the court is ill-conceived, and surely will impede and frustrate prospects for successful desegregation. Whites in counties heavily populated by blacks will be encouraged to set up, under one guise or another, independent school districts in areas that are or can be made predominantly white.

It is simply no answer to a charge of racial discrimination to say that it is designed to achieve "quality education." Where the effect of a new school district is to create a sanctuary for white students, for which

no compelling and overriding justification can be offered, the courts should perform their constitutional duty and enjoin the plan, notwithstanding professed benign objectives.

Racial peace and the good order and stability of our society may depend more than some realize on a convincing demonstration by our courts that true equality and nothing less is precisely what we mean by our proclaimed ideal of "the equal protection of the laws." The palpable evasions portrayed in this series of cases should be firmly condemned and enjoined. Such examples of racial inequities do not go unheeded by the adversely affected group. They are noted and resented. The humiliations inflicted by such cynical maneuvers feed the fires of hostility and aggravate the problem of maintaining peaceful race relations in the land. In this connection it is timely to bear in mind the admonition of the elder Mr. Justice Harlan, dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896):

The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.

I dissent from the reversal in Nos. 14929 and 14930, *United States v. Scotland Neck City Board of Education*, — F. 2d — (4th Cir. 1971), and concur in the affirmance in No. 14990, *Turner v. Littleton-Lake Gaston School District*, — F. 2d — (4th Cir. 1971).

ALBERT V. BRYAN, *Circuit Judge*, dissenting:
For me there is here no warrant for a decision different from the *Scotland Neck* and *Emporia* deter-

minations. This conclusion derives from the majority's exposition of the fact parallel of these cases with the circumstances of *Littleton-Lake Gaston*. The identicalness irresistibly argues a like disposition—reversal of the judgment on appeal.

WINTER, *Circuit Judge*, dissenting and concurring specially: I dissent from the majority's opinion and conclusion, in No. 14,552, *Wright v. Council of City of Emporia*, — F. 2d — (4 Cir. 1971), and in Nos. 14929 and 14930, *United States v. Scotland Neck City Board of Education*, — F. 2d — (4 Cir. 1971). I concur in the judgment in No. 14990, *Turner v. Littleton-Lake Gaston School District*, — F. 2d — (4 Cir. 1971), and I can accept much of what is said in the majority's opinion. There is, however, a broader basis of decision than that employed by the majority on which I would prefer to rest.

Because the majority makes the decision in *Emporia* the basis of decision in *Scotland Neck* and distinguishes them from *Littleton-Lake Gaston*, I will discuss the cases in that order. I would conclude that the cases are indistinguishable, as does my Brother Bryan, although I would also conclude that each was decided correctly by the district court and that in each we should enjoin the carving out of a new school district because it is simply another device to blunt and to escape the ultimate reach of *Brown v. Board of Education*, 347 U.S. 483 (1954), and subsequent cases.

I

While the legal problem presented by these cases is a novel one in this circuit, I think the applicable legal standard is found in the opinion of the Supreme Court in *Green v. County School Board of New Kent*

County, 391 U.S. 430 (1968). In rejecting a "freedom of choice" plan under the circumstances presented there, the Court articulated the duties of both a school board and a district court in implementing the mandate of *Brown*:

The burden on a school board today is to come forward with a plan that promises realistically to work, *and promises realistically to work now.*

* * * * *

Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "*at the earliest possible date,*" then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; *and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method.* [emphasis added.]

391 U.S. at 439.

In each of the instant cases, following a protracted period of litigation, a plan designed finally to institute a unitary school system was jeopardized by the attempt of a portion of the existing school district to break away and establish its own schools. I think the advocates of such a subdivision bear the "heavy burden" of persuasion referred to in *Green* because, as in that case, the dominant feature of these cases is the last-minute proposal of an alternative to an existing and workable integration plan. Factually, these cases are not significantly dissimilar from *Green*. Each act of secession would necessarily require the submission and approval of new integration plans for the newly-created districts, and thus each is tantamount to the proposal of a new plan. And while the act giving rise to the alternative approach here is

state legislation rather than a proposal of the local school board, the fact remains that the moving force in the passage of each piece of legislation¹ was of local origin. Few who have had legislative experience would deny that local legislation is enacted as a result of local desire and pressure. It is, therefore, to local activities that one must look to determine legislative intent.

Application of the "heavy burden" standard of *Green* to the instant cases is also supported by considerations of policy. In an area in which historically there was a dual system of schools and at best grudging compliance with *Brown*, we cannot be too careful to search out and to quash devices, artifices and techniques furthered to avoid and to postpone full compliance with *Brown*. We must be assiduous in detecting racial bias masking under the guise of quality education or any other benevolent purpose. Especially must we be alert to ferret out the establishment of a white haven, or a relatively white haven, in an area in which the transition from racially identifiable schools to a unitary system has proceeded slowly and largely unwillingly, where its purpose is at least in part to be a white haven. Once a unitary system has been established and accepted, greater latitude in redefinition of school districts may then be permitted.

Given the application of the *Green* rationale, the remaining task in each of these cases is to discern whether the proposed subdivision will have negative effects on the integration process in each area, and, if so, whether its advocates have borne the "heavy burden" of persuasion imposed by *Green*.

¹ In *Emporia*, the implementing legislation for the separation already existed; however, the local people alone made the choice to exercise the option which the statute provided.

II

EMPORIA SCHOOL DISTRICT

The City of Emporia, located within the borders of Greensville County, Virginia, became a city of the second class on July 31, 1967, pursuant to a statutory procedure dating back to the 19th Century. While it had the state-created right at that time to establish its own school district, it chose instead to remain within the Greensville County system until June, 1969. It is significant that earlier in this same month, more than a year after it had invalidated a "freedom of choice" plan for the Greensville County system, the district court ordered into effect a "pairing" plan for the county as a further step toward full compliance with *Brown* and its progeny.

The record amply supports the conclusion that the creation of a new school district for the City of Emporia would, in terms of implementing the principles of *Brown*, be "less effective" than the existing "pairing" plan for the county system. In the first place, the delay involved in establishing new plans for the two new districts cannot be minimized in light of the Supreme Court's statement in *Green* that appropriate and effective steps must be taken at once. See also *Carter v. West Feliciana School Board*, 396 U.S. 290 (1970); *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969). Secondly, as the district court found, the separation of Emporia from Greensville County would have a substantial impact on the racial balance both within the county and within the city. Within the entire county, there are 3,759 students in a racial ratio of 34.1% white and 65.9% black. Within the city there are 1,123 students, 48.3% of whom are white and 51.7% are black. If the city is permitted to establish

its own school system, the racial ratio in the remainder of the county will change to 27.8% white and 72.2% black.² To me the crucial element in this shift is not that the 48.3%-51.7% white to black ratio in the town does not constitute the town a white island in an otherwise heavily black county and that a shift of 6% in the percentage of black students remaining in the county is not unacceptably large. Whenever a school area in which racial separation has been a historical fact is subdivided, one must compare the racial balance in the preexisting unit with that in the new unit sought to be created, and that remaining in the preexisting unit after the new unit's creation. A substantial shift in any comparable balances should be cause for deep concern. In this case the white racial percentage in the new unit will increase from 27.8% to 48.3%. To allow the creation of a substantially whiter haven in the midst of a small and heavily black area is a step backward in the integration process.

And finally, the subdivision of the Greenville County school district is "less effective" in terms of the principles of *Brown* because of the adverse psychological effects on the black students in the county which will be occasioned by the secession of a large portion of the more affluent white population from the county schools. If the establishment of an Emporia school district is not enjoined, the black students in

² As part of the establishment of the new system, the Emporia school board proposed a transfer plan whereby Emporia will accept county students upon payment of tuition. The record does not contain any projection of the number of county students who would avail themselves of the plan although in argument counsel was candid in stating that only white parents would be financially able to exercise the option. The transfer plan was quickly abandoned when it became apparent that it might not earn the approval of the district court.

the county will watch as nearly one-half the total number of white students in the county abandon the county schools for a substantially whiter system. It should not be forgotten that psychological factors, and their resultant effects on educational achievement, were a major consideration in the Supreme Court's opinion in *Brown*.

In my mind, the arguments advanced by the residents of Emporia in support of their secession from the county school system do not sustain the "heavy burden" imposed by *Green*. The essence of their position is that, by establishing their own schools over which they will exercise the controlling influence, they will be able to improve the quality of their children's education. They point to a town commitment to such a goal and, in particular, to a plan to increase educational revenues through increased local taxation. They also indicate that they presently have very little voice in the management of the county school system. Although, as the district court found, the existence of these motives is not to be doubted, I find them insufficient, in considering the totality of the circumstances.

While the district court found that educational considerations were a motive for the decision to separate, it also found that "race was a factor in the city's decision to secede." Considering the timing of the decision in relation to the ordering into effect of the "pairing" plan, as well as the initial proposal of a transfer plan, this finding is unassailable. *Green* indicates that the absence of good faith is an important consideration in determining whether to accept a less effective alternative to an existing plan of integration. The lack of good faith is obvious here.

When the educational values which the residents of Emporia hope to achieve are studied, it appears that the secession will have many deleterious consequences.

As found by the district court, the high school in the city will be of less than optimum size. County pupils will be cut off from exposure to a more urban society. The remaining county system will be deprived of leadership ability formerly derived from the city. It will suffer from loss of the city's financial support, and it may lose teachers who reside in the city. To me, these consequences, coupled with the existence of the racial motive, more than offset the arguments advanced by the residents of Emporia. The separation, with its negative effects on the implementation of the principles of *Brown*, should be enjoined.

III

SCOTLAND NECK SCHOOL DISTRICT

As the majority's opinion recites, the history of resistance to school desegregation in the Halifax County school system parallels the history of the attempts on the part of the residents of Scotland Neck to obtain a separate school district. The significant fact is that in spite of otherwise apparently cogent arguments to justify a separate system, the separate system goal was not realized until, as the result of pressure from the United States Department of Justice, the Halifax County Board agreed to transfer the seventh and eighth grade black students from the previously all-black Brawley School, outside the city limits of Scotland Neck, to the Scotland Neck School, previously all-white. Chapter 31 followed thereafter as soon as the North Carolina legislature met. It is significant also that the Halifax County Board reneged on its agreement with the Department of Justice shortly before the enactment of Chapter 31.

The same negative effects on achieving integration which are present in the Emporia secession are present

here. Although the City of Scotland Neck has already submitted a plan for its school district, delay will result in devising such a plan for the remaining portion of Halifax County. The racial balance figures show that the existing county system has 8,196 (77%) black students, 2,357 (22%) white students, and 102 (1%) Indian students. Within the city system, there would be 399 (57.4%) white and 296 (42.6%) black, while the remaining county system would be comprised of 7,900 (80%) black, 1,958 (19%) white and 102 (1%) Indian. The difference between the percentage of white students within the existing system and the newly-created one for Scotland Neck is thus 35%. A more flagrant example of the creation of a white haven, or a more nearly white haven, would be difficult to imagine. The psychological effects on the black students cannot be overestimated.

The arguments advanced on behalf of Scotland Neck are likewise insufficient to sustain the burden imposed by *Green*. Even if it is conceded that one purpose for the separation was the local desire to improve the educational quality of the Scotland Neck schools, the record supports the conclusion of the district court that race was a major factor. If the basic purpose of Chapter 31 could not be inferred from the correlation of events concerning integration litigation and the attempt to secede, other facts make it transparent. As part of its initial plan to establish a separate system, Scotland Neck proposed to accept transfer students from outside the corporate limits of the city on a tuition basis. Under this transfer system, the racial balance in the Scotland Neck area was 749 (74%) white to 262 (26%) black, and the racial balance in the rest of Halifax County became 7,934 (82%) black, 1,608 (17%) white, and 102

(1%) Indian.³ This proposal has not yet been finally abandoned. In oral argument before us, counsel would not tell us forthrightly that this would not be done, but rather, equivocally indicated that the proposal would be revived if we, or the district court, could be persuaded to approve it. I cannot so neatly compartmentalize Chapter 31 and the transfer plan as does the majority, and conclude that one has no relevance to the other. To me, what was proposed, and still may be attempted, by those who provided the motivation for the enactment of Chapter 31 is persuasive evidence of what Chapter 31 was intended to accomplish.

In terms of educational values, the separation of Scotland Neck has serious adverse effects. Because Scotland Neck, within its corporate boundaries, lacked sufficient facilities even to operate a system to accommodate the only 695 pupils to be educated, it purchased a junior high school from Halifax County. This school is located outside of the corporate boundaries of Scotland Neck. The sale deprives the students of Halifax County, outside of Scotland Neck, of a school facility. The record contains abundant, persuasive evidence that the best educational policy and the nearly unanimous opinion of professional educa-

³ There is apparent error in the computations made by the district court in this regard. The district court found that the net effect of the transfer plan would be to add 350 white students to the city system. Added to the resident white students (399), the total is 749, not 759 as indicated in the opinion of the district court. The district court's figure of 262 black students in the city under the transfer plan (a net loss of 34) appears correct. But when these two totals are subtracted from the figures given for the existing county system in 1968-1969 (2,357 white, 8,196 black and 102 Indian), the effects on the county are as shown above.

tors runs contrary to the creation of a small, separate school district for Scotland Neck. A study by the State of North Carolina indicates that a minimally acceptable district has 3,500-4,000 pupils.

On the facts I cannot find the citizens of Scotland Neck motivated by the benign purpose of providing additional funds for their schools; patently they seek to blunt the mandate of *Brown*. Even if additional financial support for schools was a substantial motive, the short answer is that a community should not be permitted to buy its way out of *Brown*. Here again, the "heavy burden" imposed by *Green* has not been sustained.

IV

LITTLETON-LAKE GASTON SCHOOL DISTRICT

The majority's opinion correctly and adequately discloses the legislative response to court-ordered compliance with *Brown* and its progeny. That response was the creation of the Warrenton City School District and the Littleton-Lake Gaston School District. The overall effect of the creation of the Littleton-Lake Gaston district, the proposed tuition transfer plan, and the creation of the Warrenton City district (an act enjoined by the district court and not before us) would be to permit more than 4 out of 5 white students to escape the heavily black schools of Warren County. Even without the transfer plan, the racial balance in the Littleton-Lake Gaston district would show nearly 20% more white students than in the existing Warren County unit. To permit the subdivision would be to condone a devastating blow to the progress of school integration in this area.

Despite the assertion of the benign motives of remedying long-standing financial inequities and the

preservation of local schools, I agree with the majority that the "primary" purpose and effect of the legislation creating the Littleton-Lake Gaston school district was to carve out a refuge for white students and to preserve to the fullest possible extent segregated schools. Aside from questions of motivation, the record shows that the new district was established to accommodate a total of only 659 students, despite state policy to the contrary and expert opinion that its small size rendered it educationally not feasible. And, as the majority indicates, there is no evidence that the residents of the Littleton area have been deprived of their proportionate voice in the operation of the schools of Warren County. In short, there is a complete absence of persuasive argument in favor of the creation of the new district.

While I agree that the injunction should stand, I disagree that injunctive relief should be granted only when racial motivation was the "primary" motive for the creation of the new district. Consistent with *Green*, we should adopt the test urged by the government in *Scotland Neck*, i.e., to view the results of the severance as if it were a part of a desegregation plan for the original system—that is, to determine whether the establishment of a new district would, in some way, have an adverse impact on the desegregation of the overall system. By this test the injunction would stand in the *Littleton-Lake Gaston* case, as well as in each of the two other cases, because in each of the three there is at least some racial motivation for the separation and some not insubstantial alteration of racial ratios, some inherent delay in achieving an immediate unitary system in all of the component parts, and an absence of compelling justification for what is sought to be accomplished.

BUTZNER, *Circuit Judge*: This appeal involves the same case in which I decided questions concerning the school board's compliance with the Fourteenth Amendment when I served on the district court.* While the details differ, the same basic issues remain—the validity of measures taken to disestablish a dual school system, to create a unitary system, and to assign pupils and faculty to achieve these ends.

Title 28 U.S.C. § 47 provides: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

Recently, Judge Craven carefully examined this statute and the cases and authorities which cast light on it. He concluded that he should not sit on an appeal of a case in which he had participated as a district judge when the ultimate questions were the same: "what may a school board be compelled to do to dismantle a dual system and implement a unitary one, or how much school board action is enough?" See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 431 F. 2d 135, (4th Cir: 1970). Following the sound precedent established by Judge Craven, I believe that I must disqualify myself from participating in this appeal.

* See *Wright v. County School Bd. of Greenville County, Va.*, 252 F. Supp. 378 (E.D. Va. 1966). Two other opinions were not published.

UNITED STATES COURT OF APPEALS FOR THE FOURTH
CIRCUIT

No. 14929

UNITED STATES OF AMERICA, AND PATTIE BLACK COT-
TON, EDWARD M. FRANCIS, PUBLIC SCHOOL TEACHERS
OF HALIFAX COUNTY, ET AL., APPELLEES

versus

SCOTLAND NECK CITY BOARD OF EDUCATION, A BODY
CORPORATE, APPELLANT

No. 14930

UNITED STATES OF AMERICA, AND PATTIE BLACK COT-
TON, EDWARD M. FRANCIS, PUBLIC SCHOOL TEACHERS
OF HALIFAX COUNTY, AND OTHERS, APPELLEES

versus

ROBERT MORGAN, ATTORNEY GENERAL OF NORTH CARO-
LINA, THE STATE BOARD OF EDUCATION OF NORTH
NORTH CAROLINA, AND DR. A. CRAIG PHILLIPS,
NORTH CAROLINA STATE SUPERINTENDENT OF PUBLIC
INSTRUCTION, APPELLANTS

Appeal from the United States District Court for the
Eastern District of North Carolina, at Wilson

ALGERNON L. BUTLER, District Judge, and JOHN D.
LARKINS, JR., District Judge

Argued September 16, 1970

Before BOREMAN, BRYAN and CRAVEN, Circuit Judges
Reargued December 7, 1970—Decided March 23, 1971

Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges sitting en banc, on resubmission

William T. Joyner and C. Kitchin Josey (Joyner & Howison and Robert Morgan, Attorney General of North Carolina, on brief) for Appellants; and Brian K. Landsberg, Attorney, Department of Justice (Jeris Leonard, Assistant Attorney General, David L. Norman, Deputy Assistant Attorney General, and Francis H. Kennedy, Jr., Attorney, Department of Justice, and Warren H. Coolidge, United States Attorney, on brief) for Appellee United States of America; and James R. Walker, Jr., (Samuel S. Mitchell on brief) for Appellees Pattie Black Cotton, et al.

CRAVEN, Circuit Judge:

The Scotland Neck City Board of Education and the State of North Carolina have appealed from an order of the United States District Court for the Eastern District of North Carolina entered May 23, 1970, declaring Chapter 31 of the 1969 Session Laws of North Carolina unconstitutional and permanently enjoining any further implementation of the statute.¹ We reverse.

¹This is one of three cases now before the Court involving the "carving out" of part of a larger school district. The others are *Alvin Turner v. Littleton-Lake Gaston School District*, — F. 2d — (No. 14,990) and *Wright v. Council of City of Emporia*, — F. 2d — (No. 14,552).

Chapter 31 of the 1969 Session Laws of North Carolina,² enacted by the North Carolina General Assembly on March 3, 1969, provided for a new school district bounded by the city limits of Scotland Neck upon the

² Chapter 31 is entitled and reads as follows:

"AN ACT to improve and provide public schools of a higher standard for the residents of Scotland Neck in Halifax County, to establish the Scotland Neck City Administrative Unit, to provide for the administration of the public schools in said administrative unit, to levy a special tax for the public schools of said administrative unit, all of which shall be subject to the approval of the voters in a referendum or special election

SECTION 1. There is hereby classified and established a public school administrative unit to be known and designated as the Scotland Neck City Administrative Unit which shall consist of the territory or area lying and being within the boundaries or corporate limits of the Town of Scotland Neck in Halifax County, and the boundaries of said Scotland Neck City Administrative Unit shall be coterminous with the present corporate limits or boundaries of the Town of Scotland Neck. The governing board of said Scotland Neck City Administrative Unit shall be known and designated as the Scotland Neck City Board of Education, and said Scotland Neck City Board of Education (hereinafter referred to as: Board) shall have and exercise all of the powers, duties, privileges and authority granted and applicable to city administrative units and city boards of education as set forth in Chapter 115 of the General Statutes, as amended.

"SECTION 2. The Board shall consist of five members appointed by the governing authority of the Town of Scotland Neck, and said five members shall hold office until the next regular municipal election of the Town of Scotland Neck to be held in May, 1971. At the regular election for Mayor and Commissioners of the Town of Scotland Neck to be held in May, 1971, there shall be elected five members of the Board, and three persons so elected who receive the highest number of votes shall hold office for four years and the two persons elected who receive the next highest number of votes shall hold office

approval of a majority of the voters of Scotland Neck in a referendum. The new school district was approved by the voters of Scotland Neck on April 8, 1969, by a vote of 813 to 332 out of a total of 1,305 registered

for two years, and thereafter all members of the Board so elected, as successors, shall hold office for four years. All members of the Board shall hold their offices until their successors (sic) are elected and qualified. All members of the Board shall be eligible to hold public office as required by the Constitution and laws of the State.

"SECTION 3. All members of the Board shall be elected by the qualified voters of the Town of Scotland Neck and said election shall be held and conducted by the governing authority of the Town of Scotland Neck and by its election officials and pursuant to the same laws, rules and regulations as are applicable to the election of the municipal officials of the Town of Scotland Neck, and the results shall be certified in the same manner. The election of members of the Board shall be held at the same time and place as applicable to the election of the Mayor and Board of Commissioners of the Town of Scotland Neck and in accordance with the expiration of terms of office of members of the Board. The members of the Board so elected shall be inducted into office on the first Monday following the date of election, and the expense of the election of the members of the Board shall be paid by the Board.

"SECTION 4. At the first meeting of the Board appointed as above set forth and of a new Board elected as herein provided, the Board shall organize by electing one of its members as chairman for a period of one year, or until his successor is elected and qualified. The chairman shall preside at the meetings of the Board, and in the event of his absence or sickness, the Board may appoint one of its members as temporary chairman. The Scotland Neck City Superintendent of Schools shall be ex officio secretary to his Board and shall keep the minutes of the Board but shall have no vote. If there exists a vacancy in the office of Superintendent, then the Board may appoint one of its members to serve temporarily as secretary to the Board. All vacancies in the membership of the Board by death, resignation, removal, change

voters. Prior to this date, Scotland Neck was part of the Halifax County school district. In July 1969, the United States Justice Department filed the complaint in this action against the Halifax County Board

of residence or otherwise shall be filled by appointment by the governing authority of the Town of Scotland Neck of a person to serve for the unexpired term and until the next regular election for members of the Board when a successor shall be elected.

"SECTION 5. All public school property, both real and personal, and all buildings, facilities, and equipment used for public school purposes, located within the corporate limits of Scotland Neck and within the boundaries set forth in Section 1 of this Act, and all records, books, moneys budgeted for said facilities, accounts, papers, documents and property of any description shall become the property of Scotland Neck City Administrative Unit or the Board; all real estate belonging to the public schools located within the above-described boundaries is hereby granted, made over to, and automatically by force of this Act conveyed to the Board from the County public school authorities. The Board of Education of Halifax County is authorized and directed to execute any and all deeds, bills of sale, assignments or other documents that may be necessary to completely vest title to all such property to the Board.

"SECTION 6. Subject to the approval of the voters residing within the boundaries set forth in Section 1 of this Act, or within the corporate limits of the Town of Scotland Neck, as hereinafter provided, the governing authority of the Town of Scotland Neck, in addition to all other taxes, is authorized and directed to levy annually a supplemental tax not to exceed Fifty Cents (50c) on each One Hundred (\$100.00) Dollars of the assessed value of the real and personal property taxable in said Town of Scotland Neck. The amount or rate of said tax shall be determined by the Board and said tax shall be collected by the Tax Collector of the Town of Scotland Neck and paid to the Treasurer of the Board. The Board may use the proceeds of the tax so collected to supplement any object or item in the school budget as fixed by law or to supplement

of Education seeking the disestablishment of a dual school system operated by the Board and seeking a declaration of invalidity and an injunction against the implementation of Chapter 31. Scotland Neck

any object or item in the Current Expense Fund or Capital Outlay Fund as fixed by law.

"SECTION 7. Within ten days from the date of the ratification of this Act it shall be the duty of the governing authority of the Town of Scotland Neck to call a referendum or special election upon the question of whether or not said Scotland Neck City Administrative Unit and its administrative board shall be established and whether or not the special tax herein provided shall be levied and collected for the purposes herein provided. The notice of the special election shall be published once a week for two successive weeks in some newspaper published in the Town of Scotland Neck. The notice shall contain a brief statement of the purpose of the special election, the area in which it shall be held, and that a vote by a majority of those voting in favor of this Act will establish the Scotland Neck City Administrative Unit and its Administrative Board as herein set forth, and that an annual tax not to exceed Fifty Cents (.50c) on the assessed valuation of real and personal property, according to each One Hundred Dollars (\$100.00) valuation, the rate to be fixed by the Board, will be levied as a supplemental tax in the Town of Scotland Neck, for the purpose of supplementing any lawful public school budgetary item. A new registration of voters shall not be required and in all respects the laws and regulations under which the municipal elections of the Town of Scotland Neck are held shall apply to said special election. The governing authority of the Town of Scotland Neck shall have the authority to enact reasonable rules and regulations for the necessary election books, records and other documents for such special election and to fix the necessary details of said special election.

"SECTION 8. In said referendum or special election a ballot in form substantially as follows shall be used: VOTE FOR ONE:

"() FOR creating and establishing Scotland Neck City Administrative Unit with administrative Board to operate pub-

City Board of Education was added as a defendant in August 1969, and the Attorney General of North Carolina was added as a defendant in November 1969. On August 25, 1969, the District Court issued a temporary injunction restraining the implementation of Chapter 31, and thereafter on May 23, 1970, made the injunction permanent. The District Court reasoned that Chapter 31 was unconstitutional because it would create a refuge for white students and would interfere with the desegregation of the Halifax County school system.

lic schools of said Unit and for supplemental tax not to exceed Fifty Cents (50c) on the assessed valuation of real and personal property according to each One Hundred Dollars (\$100.00) valuation for objects of school budget.

"() AGAINST creating and establishing Scotland Neck City Administrative Unit with administrative Board to operate public schools of said Unit and against supplemental tax not to exceed Fifty Cents (50c) on the assessed valuation of real and personal property according to each One Hundred Dollars (\$100.00) valuation for objects of school budget.

"If a majority of the qualified voters voting at such referendum or special election vote in favor of establishing Scotland Neck City Administrative Unit, for creation of administrative Board to operate public schools of said Unit and for special supplemental tax as herein set forth, then this Act shall become effective and operative as to all its provisions upon the date said special election results are canvassed and the result judicially determined, otherwise to be null and void. The expense of said referendum or special election shall be paid by the governing authority of the Town of Scotland Neck but if said Unit and Board are established, then said Town of Scotland Neck shall be reimbursed by the Board for said expense as soon as possible.

"SECTION 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

"SECTION 10. This Act shall be in full force and effect according to its provisions from and after its ratification."

It is clear that Chapter 31 is not unconstitutional on its face. But a facially constitutional statute may in the context of a given fact situation be applied unfairly or for a discriminatory purpose in violation of the equal protection clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). We cannot judge the validity of the statute in vacuo but must examine it in relation to the problem it was meant to solve. *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967).

I

THE HISTORY OF SCHOOL DESEGREGATION IN HALIFAX COUNTY AND THE ATTEMPTS TO SECURE A SEPARATE SCHOOL DISTRICT FOR THE CITY OF SCOTLAND NECK

For many years until 1936, the City of Scotland Neck was a wholly separate school district operating independently of the Halifax County school system into which it was then merged. Both the elementary and the high school buildings presently in use in Scotland Neck were constructed prior to 1936 and were financed by city funds.

Halifax County operated a completely segregated dual school system from 1936 to 1965. In 1965, Halifax County adopted a freedom-of-choice plan. Little integration resulted during the next three years. Shortly after the Supreme Court decision in *Green v. County School Board of New Kent County*, 391 U.S. 430, in May of 1968, the Halifax County Board of Education requested the North Carolina Department of Public Instruction to survey their schools and to make recommendations regarding desegregation of the school system.

In July 1968, the Justice Department sent a "notice letter" to the Halifax County Board notifying them that they had not disestablished a dual school system and that further steps would be necessary to comply with *Green*. After negotiations with the Justice Department, the Halifax County Board agreed informally to disestablish their dual school system by the beginning of the 1969-70 school year, with a number of interim steps to be taken in the 1968-69 school year. As part of the interim steps, the seventh and eighth grades were transferred from the Brawley School, an all-black school located just outside the city limits of Scotland Neck, to the Scotland Neck School, previously all white.

The results of the North Carolina Department of Public Instruction survey were published in December of 1968. It recommended an interim plan and a long range plan. The interim plan proposed the creation of a unitary school system through a combination of geographic attendance zones and pairing of previously all-white schools with previously all-black schools. Scotland Neck School was to be paired with Brawley School, grades 1-4 and 8-9 to attend Brawley and grades 5-6 and 10-12 to attend Scotland Neck. The long range plan called for the building of two new consolidated high schools, each to serve half of the geographic area composing the Halifax County school district. The Halifax County Board of Education declined to implement the plan proposed by the Department of Public Instruction and the Justice Department filed suit in July 1969.

Paralleling this history of school segregation in the Halifax County school system is a history of attempts on the part of the residents of Scotland Neck to ob-

tain a separate school district. The proponents of a separate school district began to formulate their plans in 1963, five years prior to the *Green* decision and two years prior to the institution of freedom-of-choice by the Halifax County Board. They were unable to present their plan in the form of a bill prior to the expiration of the 1963 session of the North Carolina Legislature, but a bill was introduced in the 1965 session which would have created a separate school district composed of Scotland Neck and the four surrounding townships, funded partially through local supplemental property taxes. The bill did not pass and it was the opinion of many of the Scotland Neck residents that its defeat was the result of opposition of individuals living outside the city limits of Scotland Neck.

At the instigation of the only Halifax County Board of Education member who was a resident of Scotland Neck, a delegation from the Halifax County schools attempted in 1966 to get approval for the construction of a new high school facility in Scotland Neck to be operated on a completely integrated basis. The proposal was not approved by the State Division of School Planning.

After visiting the smallest school district in the state to determine the economic feasibility of creating a separate unit for the City of Scotland Neck alone, the proponents of a separate school district again sponsored a bill in the Legislature. It was this bill which was eventually passed on March 31, 1969, as Chapter 31 of the Session Laws of 1969.

II

THE THREE PURPOSES OF CHAPTER 31

The District Court found that the proponents of a special school district had three purposes in mind in sponsoring Chapter 31 and the record supports these findings. First, they wanted more local control over their schools. Second, they wanted to increase the expenditures for their schools through local supplementary property taxes. Third, they wanted to prevent anticipated white fleeing of the public schools.

Local control and increased taxation were thought necessary to increase the quality of education in their schools. Previous efforts to upgrade Scotland Neck Schools had been frustrated. Always it seemed the needs of the County came before Scotland Neck. The only county-wide bond issue passed in Halifax County since 1936 was passed in 1957. Two local school districts, operating in Halifax County received a total of \$1,020,000 from the bond issue and the Halifax County system received \$1,980,000. None of the money received by Halifax County was spent on schools within the city limits of Scotland Neck. If Scotland Neck had been a separate school district at the time, it would have received \$190,000 as its proportionate share of the bond issue. The Halifax County system also received \$950,000 in 1963 as its proportionate share of the latest statewide bond issue. None of this money was spent or committed to any of the schools within the city limits of Scotland Neck. Halifax County has reduced its annual capital outlay tax from 63 cents per \$100 valuation in 1957 to 27.5 cents per \$100 valuation in the latest fiscal year. In order for the referendum to pass under the terms of Chapter 31, the voters of Scotland Neck had to approve not

only the creation of a separate school district but in addition had to authorize a local supplementary property tax not to exceed 50 cents per \$100 valuation per year. Despite such a political albatross the referendum was favorable, and moreover, the supplementary tax was levied by the Scotland Neck Board at the full 50 cent rate.

III

WHITE FLEEING—THE QUESTIONABLE THIRD PURPOSE

But it is not the permissible first purpose or the clearly commendable second purpose which caused the District Court to question the constitutionality of Chapter 31. It is rather the third purpose, a desire on the part of the proponents of Chapter 31 to prevent, or at least diminish, the flight of white students from the public schools, that concerned the District Court. The population of Halifax County is predominantly black. The population of Scotland Neck is approximately 50 percent black and 50 percent white, and the District Court found that the pupil ratio by race in the schools would have been 57.3 percent white to 42.7 percent black.

A number of decisions have mentioned the problem of white flight following the integration of school systems which have a heavy majority of black students. *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450, 459 (1968); *Brunson v. Board of Trustees of School District No. 1 of Clarendon County*, — F. 2d — (4th Cir. 1970); *Walker v. County School Board of Brunswick County*, 413 F. 2d 53 (4th Cir. 1969); *Anthony v. Marshall County Board of Education*, 409 F. 2d 1287 (5th Cir. 1969). All of these cases hold that the threat of white flight will not justify the continuing operation of a dual

school system. But it has never been held by any court that a school board (or a state) may not constitutionally consider and adopt measures for the purpose of curbing or diminishing white flight from a unitary school system. Indeed it seems obvious that such a purpose is entirely consistent with and may help implement the *Brown* principle. It is not the purpose of preventing white flight which is the subject of judicial concern but rather the price of achievement. If the effect of Chapter 31 is to continue a dual school system in Halifax County, or establish one in Scotland Neck, the laudable desire to stem an impending flow of white students from the public schools will not save it from constitutional infirmity. But if Chapter 31 does not have that effect, the desire of its proponents to halt white flight will not make an otherwise constitutional statute unconstitutional.

In considering the effect of Chapter 31 on school desegregation in Halifax County and Scotland Neck, it is important to distinguish the effect of Chapter 31 from the effect of a transfer plan adopted by the Scotland Neck Board of Education. The effect of the transfer plan was to substantially increase the percentage of white students in the Scotland Neck schools. But the transfer plan is solely the product of the Scotland Neck Board of Education and not Chapter 31. Therefore the effect of the transfer plan has no relevance to the question of the constitutionality of Chapter 31.³

³ Appellees argue that the creation of the transfer plan is evidence that the intended effect of Chapter 31 was to preserve the previous racial makeup of the Scotland Neck schools. We disagree.

We are concerned here with the intent of the North Carolina Legislature and not the intent of the Scotland Neck Board. In determining legislative intent of an act such as Chapter 31,

The District Court held that the creation of a separate Scotland Neck School district would unconstitutionally interfere with the implementation of a plan to desegregate the Halifax County schools adopted by the Halifax County Board of Education. We hold that the effect of the separation of the Scotland Neck schools and students on the desegregation of the remainder of the Halifax County system is minimal and insufficient to invalidate Chapter 31. During the 1968-69 school year, there were 10,655 students in the Halifax County Schools, 8,196 (77%) were black, 2,357 (22%) were white, and 102 (1%) were Indian. Of this total, 605 children of school age, 399 white and 296 black, lived within the city limits of Scotland Neck. Removing the Scotland Neck students from the Halifax County system would have left 7,900 (80%) black students, 1,958 (19%) white students, and 102 (1%) Indian students. This is a shift in the ratio of black to white students of only 3 percent, hardly a substantial change. Whether the Scotland Neck students remain within the Halifax County system or attend separate schools of their own, the Halifax County schools will have a substantial majority of black students. Nor would there be a per pupil de-

it is appropriate to consider the reason that the proponents of the act desired its passage if it can be inferred that those reasons were made known to the Legislature. There is evidence in the record to show that the three purposes that the District Court found were intended by the proponents of Chapter 31 were presented to the Legislature. However, there is nothing in the record to suggest that the Legislature had any idea that the Scotland Neck Board would adopt a transfer plan after the enactment of Chapter 31 which would have the effect of increasing the percentage of white students.

We will discuss the transfer plan later in a separate part of the opinion.

crease in the proceeds from the countywide property taxes available in the remaining Halifax County system. The county tax is levied on all property in the county and distributed among the various school districts in the county on a per pupil basis. In addition, the Superintendent of Schools for the Halifax County system testified that there would be no decrease in teacher-pupil ratio in the remaining Halifax County system and in fact that in a few special areas, such as speech therapy, the teacher-pupil ratio may actually increase.

Nor can we agree with the District Court that Chapter 31 creates a refuge for the white students of the Halifax County system. Although there are more white students than black students in Scotland Neck, the white majority is not large, 57.3 percent white and 42.6 percent black. Since all students in the same grade would attend the same school, the system would be integrated throughout. There is no indication that the geographic boundaries were drawn to include white students and exclude black students as there has been in other cases where the courts have ordered integration across school district boundaries. *Haney v. County Board of Education of Sevier County*, 410 F. 2d 920 (8th Cir. 1969). The city limits provide a natural geographic boundary. There is nothing in the record to suggest that the greater percentage of white students in Scotland Neck is a product of residential segregation resulting in part from state action. See *Brewer v. School Board of the City of Norfolk*, 387 F. 2d 37 (4th Cir. 1968).

From the history surrounding the enactment of Chapter 31 and from the effect of Chapter 31 on school desegregation in Halifax County, we conclude that the purpose of Chapter 31 was not to invidiously

discriminate against black students in Halifax County and that Chapter 31 does not violate the equal protection clause of the Fourteenth Amendment.

Appellees urge in their brief that conceptually the way to analyze this case is to "view the results of severance as if it were part of a desegregation plan for the original system." We do not agree. The severance was not part of a desegregation plan proposed by the school board but was instead an action by the Legislature redefining the boundaries of local governmental units. If the effect of this act was the continuance of a dual school system in Halifax County or the establishment of a dual system in Scotland Neck it would not withstand challenge under the equal protection clause, but we have concluded that it does not have that effect.

But assuming for the sake of argument that the appellees' method of analysis is correct, we conclude that the severance of Scotland Neck students would still withstand constitutional challenge. Although it is not entirely clear from their brief, appellants' apparent contention is that the variance in the ratio of black to white students in Scotland Neck from the ratio in the Halifax County system as a whole is so substantial that if Scotland Neck was proposed as a geographic zone in a desegregation plan, the plan would have to be disapproved. The question of "whether, as a constitutional matter, any particular racial balance must be achieved in the schools" has yet to be decided by the courts. *Northcross v. Board of Education of Memphis*, —U.S.—, 90, S. Ct. 891, 893 (1970). (Burger, C. J., concurring). In its first discussion of remedies for school segregation, *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) (*Brown II*), the Supreme Court spoke in terms of "practical flexibility" and "reconciling pub-

lic and private needs." 349 U.S. at 300. In *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), the court made it clear that the school board has the burden of explaining its preference for a method of desegregation which is less effective in disestablishing a dual school system than another more promising method. Even if we assume that a more even racial balance throughout the schools of Halifax County would be more effective in creating a unitary school system, we conclude that the deviation is adequately explained by the inability of people of Scotland Neck to be able to increase the level of funding of the schools attended by their children when the geographic area served by those schools extended beyond the city limits of Scotland Neck.

Our conclusion that Chapter 31 is not unconstitutional leaves for consideration the transfer plan adopted by the Scotland Neck School Board. The transfer plan adopted by the Board provided for the transfer of students from the remaining Halifax County system into the Scotland Neck system and from the Scotland Neck system into the Halifax County system. Transfers into the Scotland Neck system were to pay \$100 for the first child in a family, \$25 for the next two children in a family, and no fee for the rest of the children in a family. As a result of this transfer plan, 350 white students and 10 black students applied for transfer into the Scotland Neck system, and 44 black students applied for transfer out of the system. The net result of these transfers would have been to have 74 percent white students and 26 percent black students in the Scotland Neck system. We conclude that these transfers would have tended toward establishment of a resegregated system and that the transfer plan violates the equal protection clause of the Fourteenth Amend-

ment.' See *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968).

We reverse the judgment of the District Court holding Chapter 31 unconstitutional, and remand to the District Court with instructions to dissolve its injunction. The District Court will retain jurisdiction to consider plans of integration proposed by Halifax County Board of Education and by Scotland Neck Board of Education.

'Perhaps it should be noted that in the school board's amended answer filed on September 3, 1969, it withdrew the original transfer plan and represented to the District Court that it intended to allow only such transfers as "may be in conformity to the law and/or Court order or orders applicable to Defendant, and in conformity to a plan of limitation of transfers to be prepared by Defendant and submitted to this Court."

UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 14990

ALVIN TURNER, ET AL., AND JOANNE AMELIA CLAYTON,
ET AL., APPELLEES

versus

THE LITTLETON-LAKE GASTON SCHOOL DISTRICT, A PUBLIC
BODY CORPORATE OF WARREN COUNTY AND HALIFAX
COUNTY, NORTH CAROLINA, APPELLANT

Appeal from the United States District Court for
the Eastern District of North Carolina, at Raleigh

Algernon L. Butler and John D. Larkins, Jr., Dis-
trict Judges.

Argued December 7, 1970—Decided March 23, 1971

Before HAYNSWORTH, Chief Judge, SOBELOFF, BORE-
MAN, BRYAN, WINTER, CRAVEN and BUTZNER, Cir-
cuit Judges sitting en banc

*William S. McLean (McLean, Stacy, Henry & Mc-
Lean; James H. Limer; Robert Morgan, Attorney
General of North Carolina, and Ralph Moody, Deputy
Attorney General of North Carolina, on brief) for
Appellant, and Adam Stein (J. LeVonne Chambers,
and Chambers, Stein, Ferguson & Lanning; T. T.
Clayton and Frank Ballance, and Clayton and Bal-
lance; Conrad O. Pearson; Jack Greenberg, James M.
Nabrit, III, and Norman Chachkin on brief) for
Appellees.*

CRAVEN, Circuit Judge: This is one of three cases on appeal in which the court below enjoined the carving out of a new school district containing approximately 50 percent white students and 50 percent black students from a county school district containing a substantial majority of black students. In the other two cases, we reversed the district court. *United States v. Scotland Neck Board of Education*, — F. 2d —, Nos. 14929 and 14930 (4th Cir. —, 1971); *Wright v. Council of City of Emporia*, — F. 2d —, No. 14552 (4th Cir. —, 1971). In this one, we affirm.

This suit to compel the desegregation of the Warren County school system was begun in 1963. Back then Warren County had assigned all of the white students to six all-white schools, all of the black students to thirteen all-black schools and all of the Indian students to one all-Indian school. During the school years beginning in the fall of 1964, 1965 and 1966, Warren County assigned its students to the various schools through a freedom of choice plan. On May 16, 1967, the district court determined that the freedom of choice plan had failed to materially alter the previously existing racially segregated school system and ordered the Warren County School Board to take affirmative action to eliminate the dual school system. The affirmative action taken by the school board was to assign a handful of black and Indian students to predominantly white schools and assign four teachers across racial lines. On July 31, 1968, the district court found that Warren County was still operating a dual school system and ordered the school board to file a plan for the elimination of racial segregation. The first two plans were rejected as inadequate. Finally, on December 1, 1968, the school board submitted a third plan providing for geographic attendance zones

to take effect with the beginning of the 1969-70 school year. This plan was approved by the district court in July 1969.

Opposition to the school board's third plan arose soon after it was submitted. The opposition resulted in proposals for the creation of separate school districts for the town of Warrenton and the area surrounding the town of Littleton. Bills were introduced to the North Carolina legislature to carve new school districts for these two areas out of the existing Warren County school district. The governing bodies of the two new school districts were denominated the Warrenton City Board of Education and the Littleton-Lake Gaston School District. The Warren County Board of Education approved petitions urging the passage of these bills. The two bills were passed by the North Carolina legislature and ratified as Chapters 578 and 628 of the 1969 North Carolina Session Laws. The residents of both affected areas approved the creation of the new school districts by referendum.

On July 17, 1969, the plaintiffs filed a supplemental complaint seeking a declaratory judgment that Chapters 578 and 628 of the 1969 North Carolina Session Laws were unconstitutional and seeking an injunction against the operation of the two newly created school systems. On August 25, 1969, a temporary injunction against the operation of the two new school districts was issued by the United States District Court for the Eastern District of North Carolina. The injunction was made permanent on May 26, 1970. The Littleton-Lake Gaston School District appealed. The Warrenton City Board of Education has not appealed.

The constitutionality of the legislation creating the Littleton-Lake Gaston School District depends on whether its primary purpose is to prevent, insofar as

is possible, the dismantling of the former dual school system. *Wright v. Council of City of Emporia*, — F. 2d. —, No. 14552 (4th Cir. ———, 1971). Legislatures are assumed to intend the natural and reasonable effect of the legislation they enact. "In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect. . . ." *People ex rel. Parke, Davis & Co. v. Roberts*, 171 U.S. 658 (1898).

Looking at effect only, and ignoring the abortive creation of the Warrenton City School district, this case is similar to *Scotland Neck* and *Emporia*, *supra*. Removing the students who were to attend the Littleton-Lake Gaston School District would alter the racial balance in the remaining Warren County school district by, at most, 5.5 percent, from 28 percent white, 67 percent black and 6 percent Indian, to 21.5 percent white, 72.5 percent black and 6 percent Indian.¹ There would be a substantial majority of black students in the Warren County system whether or not these students were removed. Also, paralleling *Scotland Neck* and *Emporia*, the Littleton-Lake Gaston school officials argued in the district court that the creation of the special school district was designed to remedy long standing financial difficulties and to prevent the imminent elimination of school facilities from the town of Littleton. The town of Littleton lies partly in Warren County and partly in Halifax County.

¹ The appellants and the appellees disagree on the method that should be employed to measure the effect of the removal of the students who were to attend the Littleton-Lake Gaston School District on the racial balance in Warren County. According to the appellants, the effect would have been a change in the racial balance in the remaining Warren County system of no more than 2.6 percent. Our disposition of this case does not require us to resolve this dispute.

Historically, students from both Warren County and Halifax County attended school in Littleton, although the school was officially part of the Warren County school system. The Warren County Board refused to fund the Littleton school at a level commensurate with other schools in the system arguing that Halifax County should provide support for the students from Halifax County. The Halifax County Board refused to provide funds for a school run by Warren County. Apparently as a result of this financial dilemma, the physical condition of the school building in Littleton was deteriorating. A report by the North Carolina Division of School Planning in 1965 recommended the eventual abandonment of school facilities presently in use in Littleton. Although the report did not specify where replacement facilities would be erected, the Littleton officials apparently assume that they would not be located in Littleton.

Despite these similarities, we think there are important differences that distinguish this case from *Scotland Neck* and *Emporia*. In both *Scotland Neck* and *Emporia*, the district courts specifically found that there were non-invidious purposes for the creation of the new school districts. The opinion below in this case, signed by the same two district judges who sat in *Scotland Neck*, contains no such findings. In both *Scotland Neck* and *Emporia*, the geographic boundaries of the new school districts are the previously existing boundaries of the two cities. The Littleton-Lake Gaston School District is composed of the town of Littleton, two townships in Warren County and part of a third township in Halifax County. Why U.S. 158 was selected as the southern boundary for the new school district is not satisfactorily explained. New boundary lines are suspect and require close scrutiny to assure that they are not gerrymandered for invid-

ious purposes. Although the financial difficulties of the Littleton school are of long standing and the report recommending the abandonment of the Littleton school facilities predates the creation of the Littleton-Lake Gaston School District by four years, there were no attempts by the residents of the Littleton area to obtain a separate school district prior to the time that effective integration was imminent as there were in *Scotland Neck*. Unlike *Emporia*, the residents of the Littleton area have not been deprived of their proportionate voice in the governmental affairs of Warrenton County.

But we need not decide whether these differences alone are sufficient to compel a result different from the disposition of *Scotland Neck* and *Emporia*. In determining the purpose of legislation, it is appropriate to consider not only the effect of the legislation itself, but also the history and setting out of which the legislation arose. See *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968). The adverse reaction and strong opposition to the third desegregation plan submitted by the Warren County Board of Education plainly fueled the creation of the two new school districts, Littleton-Lake Gaston and the Warrenton City Administrative Unit. The two bills creating these school districts were introduced on April 10 and 11, 1969, a day apart, and were ratified three days apart. Both were "local bills" sponsored by representatives to the North Carolina legislature from districts including Warren County. The court below focused, quite properly, on the combined effect of these two bills. The net effect of both bills would have been to reduce the number of white students in the Warrenton County school system from 1,415 (27 percent) to 260 (7 percent)—allowing more

than four out of five white students to escape the heavily black schools of Warren County.² The finding of the district court that the primary purpose of the legislation was to carve out a refuge for white students and preserve to the extent possible segregated schools in Warren County is supported by substantial evidence, and indeed, is inescapable. Accordingly, we affirm the judgment of the district court enjoining the establishment of the Littleton-Lake Gaston School District.

Affirmed.

² These figures include the net effect of transfer plans adopted by both the Littleton-Lake Gaston School District and the Warrenton City Board of Education. In *Scotland Neck* we concluded that the effect of a transfer plan adopted by the Scotland Neck Board of Education had no relevance to the question of the constitutionality of the legislation creating the Scotland Neck school district because there was nothing in the record to suggest that the legislature was aware that Scotland Neck would adopt a transfer plan. In this case, however, such evidence does appear in the record. The school facilities in Warrenton had a capacity of 1,000 to 1,200 students but the Warrenton City Unit contained only 206 resident students. The district court found that Warren County could not accommodate its present students without utilizing the surplus space in Warrenton and that Warrenton could not maintain acceptable educational standards in a 12-grade school system containing only 200 students. Thus, Warrenton could not operate a separate school system without a substantial number of students transferring from the county. In addition, there was direct testimony by State Senator Julian Allsbrock, one of the sponsors of the Littleton-Lake Gaston bill, that there was some discussion of students transferring into the Littleton-Lake Gaston School District while the bill was pending. Volume III, Record on Appeal, Transcript of Hearing at Raleigh, North Carolina, December 17, 1969, at 23, 59.

Memorandum Opinion of District Court

[Filed March 2, 1970]

MERHIGE, District Judge.

The plaintiffs in this action filed a supplemental complaint on August 1, 1969, alleging that the added defendants, the City Council and the School Board of the City of Emporia, had taken steps to establish a city school system independent of the Greenville County system, then under a desegregation order in this suit. Emporia, a city of the second class since 1967, is surrounded by Greenville County. Through the school year 1968-69 public school pupils resident in Emporia had attended schools operated by Greenville County; the city had been reimbursing the county for this service under a contract of April 10, 1968.

On August 8, 1969, the added defendants were temporarily enjoined by this Court from any steps which would impede the implementation of the outstanding desegregation order. Subsequently the Emporia officials answered, denying the allegation that the plan for separation would frustrate the efforts of the Greenville County School Board to implement the plan embraced by the Court's order. The matter was then continued until December 18, 1969, for a hearing on whether the injunction should be made permanent.

The original action seeking relief from alleged racial discrimination in the operation of the Greenville County School System, was filed in March of 1965. Emporia was not a city under Virginia law until July 31, 1967; until that time the county was alone responsible for the public education of those within its borders. Under the contract of April 10, 1968, the county continued this service in exchange for the payment of 34.26% of the cost of the system.

On June 21, 1968, the plaintiffs moved for additional relief. Up to that point the county-administered system had operated under a free-choice plan which, plaintiffs asserted, had not achieved constitutional compliance under *Green v. County School Board of New Kent County*, 391 U.S. 480, 88 S.Ct. 1669, 20 L.Ed.2d 716 (1968). The 1967-68 enrollment figures show the racial distribution then prevailing:

School	Students		Faculty	
	W	N	W	N
Greensville County High	719	50	39½	1
Emporia Elementary	857	46	34½	2
Wyatt High	0	809	4½	32½
Moton Elementary	0	552	0	22½
Zion Elementary	0	255	1	12½
Belfield Elementary	0	419	3	14
Greensville County Training	0	439	0	16

The two schools then attended by all the white students were and still are in the city of Emporia, as is the training school; others are in the county.

The county proposed the extension of the free choice plan for another year while a zoning or pairing plan was developed. The plaintiffs took exception. The Court ordered the county to file a pupil desegregation plan bringing the system into compliance with *Green* by January 20, 1969. The county again proposed that the free choice plan be retained with certain changes, principally involving transfers out of a pupil's regular school for special classes and faculty reassignment. As an alternative, if the first proposal were rejected, the county suggested a plan under which the high school population would be divided between the two facilities on the basis of curriculum pursued, academic or vocational. Faculties would be reassigned to achieve at least a

75%-25% ratio in each school. Elementary school desegregation would be achieved by the transfer of individual Negroes to white schools "on the basis of standardized testing of all students."

The plaintiffs suggested the assignment of all students on the basis of grades attained to specific schools; pairing, in other words, the entire system. Elementary teachers were to follow their classes as reassigned, and high school teachers were to be shifted so that the racial balance in the Wyatt School and Greenville County High would be approximately the same.

A hearing was held on June 17, 1969, and this Court stated its findings and indicated its intention to order that the plaintiffs' plan be adopted.

By order of June 25, 1969, this Court rejected the defendants' proposals and ordered the plaintiffs' plan put into effect. Subsequently the plan was modified slightly on defendants' motion; the pupil assignments ordered on July 30, 1969, were as follows:

<i>School</i>	<i>Grades</i>
Greenville County High	10, 11, 12
Junior High (Wyatt)	8, 9
Zion Elementary	7
Belfield Elementary	5, 6
Moton Elementary	4, 5
Emporia Elementary	1, 2, 3
Greenville County Training	Special Education

On July 9, 1969, the city council met especially to formulate plans for a city school system. On July 10th the mayor sought the cooperation of county officials in selling or leasing school facilities located in Emporia. On July 14th the council instructed the city school board to take steps to create a city school division. On July 23rd the council

requested the state board of education to authorize the establishment of such a division, which request has been tabled by the State Board "in light of matters pending in the federal court," defendants' Ex. E-1. The Emporia school board in the meantime advised the county officials that the contract would no longer be honored and that city pupils would not attend the county system in the forthcoming school year. A notice of July 31, 1969, published by the city school board, required that school age children resident in Emporia be registered and invited applications from non-residents on a tuition basis. The injunction of August 8, 1969, however, resulted in a continuation of city pupils attending the county system for the present school year.

At a hearing on December 18, 1969, the city took the position that the contract was void under state law (see defendants' Ex. E-J); this question is the subject of pending litigation brought by the city on October 1, 1969, in the state courts. The evidence shows that the city on September 30, 1969, notified the county of its view that the contract is invalid and its intention to terminate the contract under its terms, in any case, effective in July, 1971. Payments, however, were continued through the date of the December hearing. Emporia officials also have assured the Court that they have no intention of entertaining applications from nonresidents until so permitted by this Court.

At the hearing the county, unfortunately, took no position.

A resolution of the city school board of December 10, 1969, defendants' Ex. E-F, outlines the city's plan. Elementary levels through grade six would be conducted in the Emporia Elementary School building; grades seven through twelve would be housed in the Greensville County High School. Defendants' Ex. E-G includes budgetary

projections for the new system. The city projects enrollment figures for the system at about ten percent above the number of city residents now in the public system "on the expectation that some pupils now attending other schools would return to a city-operated school system," defendants' Ex. E-F, at 1.

The city clearly contemplates a superior quality educational program: It is anticipated that the cost will be such as to require higher tax payments by city residents. A kindergarten program, ungraded primary levels, health services, adult education, and a low pupil-teacher ratio are included in the plan, defendants' Ex. E-G, at 7, 8.

The county has filed, at the Court's request, a statistical breakdown of the students and faculty in the county-administered schools, now in operation under this Court's order of July 30, 1969. The table below shows the current racial makeup of the seven schools:

<i>School</i>	<i>Students</i>		<i>Faculty</i>	
	<i>W</i>	<i>N</i>	<i>W</i>	<i>N</i>
Emporia Elementary	283	655	17	18
Grades 1-3	30.1%	69.9%		
Hicksford (Moton)	238	405	11	13
Grades 4-5	37%	63%		
Belfield	107	243	7	11
Grade 6	30.6%	69.4%		
Zion	127	238	7	7
Grade 7	34.8%	65.2%		
Junior High	215	443	19	21
Grades 8-9	32.6%	67.4%		
Senior High	346	424	31	14
Grades 10-12	44.9%	55.1%		
Training School	10	63	1	8
	13.7%	86.3%		

By comparison, the county reported the following racial characteristics for the 1968-69 school year:

<i>School</i>	<i>Students</i>		<i>Faculty</i>	
	<i>W</i>	<i>N</i>	<i>W</i>	<i>N</i>
Greensville County High	720	45	39	1
Wyatt H.S. (present Jr. High)	0	829	5	34
Emporia Elementary	771	53	33	3
Moton (present Hicksford)	0	521	5	18
Zion	0	248	1	13
Greensville County Training	0	387	0	17
Belfield	0	427	2	16

The procedural status of the case at present needs clarification. The plaintiffs contend that no one has made application to this Court that its order of June 25, as modified on July 30, be amended. This is the outstanding desegregation order addressed to "the defendants herein, their successors, agents, and employees." They contend that this Court is therefore limited to the inquiry whether the city officials threaten to interfere with the implementation of the order and therefore should be permanently enjoined.

Some passages in the city officials' briefs support this contention. In their rebuttal brief they state that the city is not seeking any sort of judicial relief excepting that the injunction of August 8, 1969, be lifted. They contend that any change in the existing desegregation order would be "a matter to be resolved by the Court, the plaintiffs and Greensville County, and would not involve the city." [Rebuttal brief of January 23, at 3.] Such a position, however, is inconsistent with that taken by counsel at the December 18th hearing. Issues explored went beyond the question whether the city's initiation of its own system would necessarily clash with the administration of the

existing pairing plan; indeed there seems to be no real dispute that this is so. The parties went on to litigate the merits of the city's plan, developing the facts in detail with the help of an expert educator. Counsel for the city stated that "at the conclusion of the evidence today, we will ask Your Honor to approve the assignment plan for the 1970-71 school year and to dissolve the injunction now, against the city, effective at the end of this school year," Tr., Dec. 18, at 11.

It seems clear that the supplemental complaint sought to join the city officials not so much as successors, in full or in part, to the official powers and interests of the original defendants, but rather as persons who intended to use state powers to interfere with the plaintiffs' enjoyment of their constitutional right to unsegregated public education. Ample precedent exists for authority to grant relief in such a case. *Faubus v. United States*, 254 F.2d 797 (8th Cir., 1958); *Lee v. Macon County Board of Education*, 231 F.Supp. 743 (M.D.Ala. 1964). Indeed such orders have issued against private parties, on occasion, even at the instance of state officials, *Kasper v. Brittain*, 245 F.2d 92 (6th Cir. 1957); *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956). Plaintiffs did not specifically request then or since that the city officials be joined or substituted as parties defendant pursuant to Fed. Rules Civ. Proc., Rule 25(c), or Rule 25(d), 28 U.S.C.

Nevertheless, this Court has concluded that the plaintiffs' failure to so move was, under the circumstances, excusable and indeed unnecessary. The city defendants, by their actions, have made it clear that, according to state law, they have succeeded to the powers of the county board members over public school students resident in the city. They now desire to exercise these latent powers and have asked this Court to amend its orders to enable them to so do. A word about the Virginia education law aids in understanding this aspect of the case.

When Emporia became a city the duty fell upon it to establish a school board to supervise public education in the city. §§ 22-2, 22-93, 22-97, Va.Code Ann., 1950. State law permits, however, the consolidation of a city with a county to form a single school division, with the approval of the State Board of Education, § 22-30, Va.Code Ann., 1950. In such a case a single school board may be established with the approval of both governmental units. § 22-100.2, Va.Code Ann., 1950; the individual boards would then cease to exist, § 22-100.11, Va.Code Ann., 1950. Alternatively, the two boards might remain in existence and meet jointly to choose a division superintendent, § 22-34, Va.Code Ann., 1950. There is provision as well for the establishment of jointly owned schools, § 22-7, Va.Code Ann., 1950. When a city contracts with a county for the provision of school services, moreover, there is specific provision that the county board shall include representatives of the city, § 22-99, Va.Code Ann., 1950. Therefore, once it became a city, there is no doubt that Emporia succeeded to the state-law powers and duties of actively administering public schools for its residents under one of these statutory schemes. It has not, however, until recently sought to exercise that power. Only after the June order did the city move to assume the powers that it had, by contract, delegated to the county, plaintiffs' exhibit 12.

Under federal practice, an injunction may not issue against and bind all the world. The persons whose conduct is governable by court order are defined by rule:

Every order granting an injunction * * * is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by per-

sonal service or otherwise. Fed. Rules Civ.Proc., Rule 65(d), 28 U.S.C.

This rule fixes the scope of valid orders, and terms in a decree exceeding the rule are of no effect, *Swetland v. Curry*, 188 F.2d 841 (6th Cir. 1951); *Alemite Mfg. Co. v. Staff*, 42 F.2d 832 (2d Cir. 1930); *Baltz v. The Fair*, 178 F.Supp. 691 (N.D. Ill. 1959); *Chisolm v. Caines*, 147 F.Supp. 188 (E.D.S.C. 1954). In general, only those acting in concert with, or aiding or abetting, a party can be held in contempt for violating a court order. One whose interest is independent of that of a party and who is not availed of as a mere device for circumventing a decree is not subject to such sanctions, *United Pharmacal Corp. v. United States*, 306 F.2d 515, 97 A.L.R.2d 485 (1st Cir. 1962). The law exposes to summary punishment only those who have already had their rights adjudicated in court. Consistent with these limitations, a court will only order a public official to perform or refrain from certain acts which are within the powers conferred upon him by law, *Bell v. School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963), and will deny relief when those parties before it are not fully empowered, under state law, to take the action requested, *Thaxton v. Vaughan*, 321 F.2d 474 (4th Cir. 1963).

Under these precedents one might conclude that, because the city officials were not parties to any of the proceedings in this case prior to the filing of the supplemental complaint, they are therefore not bound by decrees in that litigation. But a line of cases involving public officers has also evolved holding that a decree may bind one who succeeds to the powers exercised by the officer who was a party to the original suit. In *Regal Knitwear Co. v. N. L. R. B.*, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661 (1945), the Supreme Court recognized that a decree might bind "successors" to a private litigant, at least if they came within

the usual "privity" doctrines. *Lucy v. Adams*, 224 F.Supp. 79 (N.D.Ala.1963), held that the successor to a state university dean of admissions was bound by a decree against his predecessor so long as he had notice of the injunction. In *Lankford v. Gelston*, 364 F.2d 197, 205 n. 9 (4th Cir. 1966), an injunction against a police official or his successor was expressly endorsed. The injunction of June 25, 1969, as mentioned above, issued against the county officials or their successors. No one contests that the city officers had notice of the decree. The Emporia officials in a very real sense appear now to have succeeded, under state law, to the part of the county officers' powers and thus are amenable to the decree.

It is irrelevant that the city officials hold positions that differ in name from those of the original parties. Substitution in analogous situations has been effectuated under Fed. Rules Civ. Proc. Rule 25(d) 28 U.S.C., when the relevant functions have been moved from one office to another, *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S.Ct. 1129, 91 L.Ed. 1375 (1947); *Toshio Joji v. Clark*, 11 F.R.D. 253 (N.D.Cal.1951); *Porter v. American Distilling Co.*, 71 F.Supp. 483 (S.D.N.Y. 1947), cf. *Skolnick v. Parsons*, 397 F.2d 523 (7th Cir. 1968).

The city might have moved for substitution under Fed. Rules Civ. Proc.; Rule 25(d), but its failure to do so is quite excusable. The county officials were under contract to operate the schools, and the question of the validity of that instrument was not raised. Greenville County officials were in possession of the schools whereas the city board was by all indications asserting no control. The county board, when ordered to take certain steps in the exercise of its power over the public school pupils of the city and the county, did not protest its lack of power. It may yet possess power over both city and county residents, at least for the term of the contract. But the city's actions subsequent to

the pairing decree, and in particular the pending suit to declare the contract void, cast great doubt on the county's authority under state law. To all appearances the city board, but for and subject to the decree of this Court ordering non-interference, now has the power under state law to administer schools for the city residents. Certainly it must have such power, even if the contract is valid, commencing July 1, 1971.

As a successor in interest to a party to the original decree, it would seem that the city school board now has sufficient standing under Fed.Rules Civ.Proc., Rule 60(b), 28 U.S.C., to move to amend the outstanding decree. Those cases holding such relief to be unavailable to nonparties concern chiefly the applications of persons who did not have an interest in the judgment identical to that of the original party, *Mobay Chemical Co. v. Hudson Foam Plastics Corp.*, 277 F.Supp. 413 (S.D.N.Y. 1967); *United States v. 140.80 Acres of Land*, 32 F.R.D. 11 (E.D.La. 1963); *United States v. International Boxing Club*, 178 F.Supp. 469 (S.D.N.Y. 1959). The present standing of the city board members is still problematical because the validity of the contract has not been finally adjudicated. But it is clear that they will enjoy the relevant powers at least in the 1971-1972 school year, and sooner if they succeed in their litigation; this puts them in a position to move to modify the decree.

The Court therefore must proceed to the merits of the city's plan, treating the school board's application, as discussed above, as a motion under Fed.Rules Civ.Proc., Rule 60(b), 28 U.S.C.

The county board has provided data on the composition of the student body of each school as currently operated, broken down by race and by place of residence. The tables below are based upon that information:

Overall System, September 1, 1969

Students by race and residence:

	White	Negro	Total	% White	% Negro
County:	728	1888	2616	27.8%	72.2%
City:	543	580	1123	48.3%	51.7%
Total	1282	2477	3759	34.1%	65.9% ¹

The establishment of separate systems would plainly cause a substantial shift in the racial balance. The two schools in the city, formerly all-white schools, would have about a 50-50 racial makeup, while the formerly all-Negro schools located in the county which, under the city's plan, would constitute the county system, would overall have about three Negro students to each white. As mentioned before, the city anticipates as well that a number of students would return to city system from private schools. These may be assumed to be white, and such returnees would accentuate the shift in proportions.

The city contemplates placing grades one through six in the Emporia Elementary School building. Such a school would have 314 Negro students and 270 white; 46.2% white and 53.8% Negro. A city high school incorporating grades seven through twelve would have 252 Negro students and 271 white; this would make for a ratio of 51.8% white to 48.2% Negro pupils.

¹ Figures secured from Greenville County school system; total students include 11 white and 9 Negro, who apparently reside outside both county and city.

The impact of separation in the county would likewise be substantial. The distribution of county residents, by grade and race, is as follows:

	<i>White</i>	<i>Negro</i>
Grades 1-3	167—26.3%	468—73.7%
Grades 4-5	142—31.1%	314—68.9%
Grade 6	57—23.5%	185—76.5%
Grades 7-9	192—27.5%	506—72.5%
Grades 10-12	161—30.6%	365—69.4%

These figures should be compared with the current percentages reported by the county, given in a table above. At each level the proportion of white pupils falls by about four to seven percent; at the high school level the drop is much sharper still.

The motives of the city officials are, of course, mixed. Ever since Emporia became a city consideration has been given to the establishment of a separate city system. A second choice was some form of joint operating arrangement with the county, but this the county would not assent to. Only when served with an "ultimatum" in March of 1968, to the effect that city students would be denied access to county schools unless the city and county came to some agreement, was the contract of April 10, 1968, entered into. Not until June of 1969 was the city advised by counsel that the contract was, in all probability, void under state law. The city then took steps to have the contract declared void and in any event to terminate it as soon as possible.

Emporia's position, reduced to its utmost simplicity, was to the effect that the city leaders had come to the conclusion that the county officials, and in particular the board of supervisors, lacked the inclination to make the court-ordered unitary plan work. The city's evidence was to the effect that increased transportation expenditures would have to be

made under the existing plan, and other additional costs would have to be incurred in order to preserve quality in the unitary system. The city's evidence, uncontradicted, was to the effect that the board of supervisors, in their opinion, would not be willing to provide the necessary funds.

While it is unfortunate that the county chose to take no position on the instant issue, the Court recognizes the city's evidence in this regard to be conclusions; and without in any way impugning the sincerity of the respective witnesses' conclusions, this Court is not willing to accept these conclusions as factual simply because they stand uncontradicted. Assuming arguendo, however, that the conclusions aforementioned are indeed valid, then it would appear that the Court ought to be extremely cautious before permitting any steps to be taken which would make the successful operation of the unitary plan even more unlikely.

The Court does find as a fact that the desire of the city leaders, coupled with their obvious leadership ability, is and will be an important facet in the successful operation of any court-ordered plan.

Dr. Tracey, a professor of education at Columbia University, felt that the county budget had not even been increased sufficiently to keep up with inflation in the 1969-1970 year, and that it seemed that certain cutbacks had been made in educational programs, mainly to pay for increased transportation costs. In Dr. Tracey's opinion the city's projected budget, including higher salaries for teachers, a lower pupil-teacher ratio, kindergarten, ungraded primary schooling, added health services, and vocational education, will provide a substantially superior school system. He stated that the smaller city system would not allow a high school of optimum size, however. Moreover, the division of the existing system would cut off county pupils from exposure to a somewhat more urban society. In his opinion as an educator, given community support for the programs he

envisioned, it would be more desirable to apply them throughout the existing system than in the city alone.

While the city has represented to the Court that in the operation of any separate school system they would not seek to hire members of the teaching staff now teaching in the county schools, the Court does find as a fact that many of the system's school teachers live within the geographical boundaries of the city of Emporia. Any separate school system would undoubtedly have some effect on the teaching staffs of the present system.

Dr. Tracey testified that his studies concerning a possible separate system were conducted on the understanding that it was not the intent of the city people to "resegregate" or avoid integration. The Court finds that, in a sense, race was a factor in the city's decision to secede. This Court is satisfied that the city, if permitted, will operate its own system on a unitary basis. But this does not exclude the possibility that the act of division itself might have foreseeable consequences that this Court ought not to permit. Mr. Lankford, chairman of the city school board, stated:

Race, of course, affected the operation of the schools by the county, and I again say, I do not think, or we felt that the county was not capable of putting the monies in and the effort and the leadership into a system that would effectively make a unitary system work * * *, Tr.Dec. 18, at 28.

Mr. Lankford stated as well that city officials wanted a system which would attract residents of Emporia and "hold the people in public school education, rather than drive them into a private school * * *," Tr.Dec. 18, at 28.

Under *Monroe v. Board of Commissioners*, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968), and under principles derived from *Brown v. Board of Education*, 347 U.S.

483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), federal courts cannot permit delay or modification in plans for the dismantling of dual school systems for the purpose of making the public system more palatable to some residents, in the hopes that their flight to private schools might be abated. The inevitable consequence of the withdrawal of the city from the existing system would be a substantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools. The county officials, according to testimony which they have permitted to stand un rebutted, do not embrace the court-ordered unitary plan with enthusiasm. If secession occurs now, some 1,868 Negro county residents must look to this system alone for their education, while it may be anticipated that the proportion of whites in county schools may drop as those who can register in private academies. This Court is most concerned about the possible adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs. This is not to say that the division of existing school administration areas, while under desegregation decree, is impermissible. But this Court must withhold approval "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system," *Monroe v. Board of Commissioners, supra*, 391 U.S. 459, 88 S.Ct. 1705. As a court of equity charged with the duty of continuing jurisdiction to the end that there is achieved a successful dismantling of a legally imposed dual system, this Court cannot approve the proposed change.

This Court's conclusion is buttressed by that of the district court in *Burleson v. County Board of Election Commissioners*, 308 F.Supp. 352 (E.D.Ark., Jan. 22, 1970). There, a section of a school district geographically separate from the main portion of the district and populated princi-

ipally by whites was enjoined from seceding while desegregation was in progress. The Court so ruled not principally because the section's withdrawal was unconstitutionally motivated, although the Court did find that the possibility of a lower Negro population in the schools was "a powerful selling point," *Burleson v. County Board of Election Commissioners*, supra, 308 F.Supp. 357. Rather, it held that separation was barred where the impact on the remaining students' right to attend fully integrated schools would be substantial, both due to the loss of financial support and the loss of a substantial proportion of white students. This is such a case.

If Emporia desires to operate a quality school system for city students, it may still be able to do so if it presents a plan not having such an impact upon the rest of the area now under order. The contractual arrangement is ended, or soon will be. Emporia may be able to arrive at a system of joint schools, within Virginia law, giving the city more control over the education its pupils receive. Perhaps, too, a separate system might be devised which does not so prejudice the prospects for unitary schools for county as well as city residents. This Court is not without the power to modify the outstanding decree, for good cause shown, if its prospective application seems inequitable.

**District Court's
Findings of Fact and Conclusions of Law**

[Filed on August 8, 1969]

This cause came on to be heard on the verified supplemental complaint and the plaintiffs' motion for an interlocutory injunction as prayed in the supplemental complaint; and having heard oral evidence and received exhibits in open court, the Court makes the following

FINDINGS OF FACT

This action, seeking the racial desegregation of the public school system of Greenville County, was commenced March 15, 1965.

On July 31, 1967, the Town of Emporia became a city of the second class known as the City of Emporia.

In recognition of its obligation to provide certain services and facilities including public schools for children within its boundaries, the said City by the Council thereof on April 10, 1968 entered into and signed an agreement with the surrounding County of Greenville acting through the Board of Supervisors thereof, whereby the County would continue to provide public schools to the citizens of the City of Emporia in the same manner as when the City was a town and to the same extent as provided to the citizens of the County, and the City would pay as billed its contractual share, ascertained at 34.26 percentum, of the local cost to the County. Said agreement provides for its continuing effectiveness for a period of four years and thereafter until notice will be given by either party to the other by December 1 of any year that said agreement would be terminated on July 1 of the second year following such notice. The contract provides for other contingencies in reference to termination.

On June 17, 1969, this Court stated from the bench its findings of fact and conclusions of law regarding the plaintiffs' motion for further relief and indicated that an order would be entered requiring the County School Board of Greenville County to implement the plan for desegregation filed by the plaintiffs which proposed the use of two school buildings located near but outside the City limits for all children in primary and lower elementary grades living south of the Meherrin River, the use of a school building located within the City and one located near but outside the City limits for all children in primary and lower elementary grades living north of the Meherrin River, the assignment of all pupils in intermediate grades to Emporia Elementary School located within the City of Emporia, the assignment of all pupils in the junior high school grades to Wyatt High School located near but outside the City limits, and the assignment of all pupils in the senior high school grades to Greenville County High School located within the City limits. The only two schools in the system which white children have ever attended are within the City.

On June 24, 1969, Bruce Lee Townsend, an infant, etc., et al, residents of the City of Emporia, filed in the Circuit Court of the County of Greenville a petition (which on the same day was served on the respondents thereof, viz: City Council of City of Emporia, School Board of City of Emporia, Greenville County Board of Supervisors, and Greenville County School Board) seeking, *inter alia*, judicial dissolution of the above mentioned agreement of April 10, 1968, and an injunction preventing any pupils residing within the City from being assigned to schools not located within the City. Each of the respondents demurred to said petition on July 15, 1969.

On July 9, 1969, William H. Ligon, L. R. Brothers, Jr., T. Cato Tillar, Fred A. Morgan, Julian C. Watkins, S. G. Keedwell, M. L. Nicholson, Jr., and Robert F. Hutcheson,

constituting the Council of the City of Emporia; George F. Lee, Mayor of the City; D. Dortch Warriner, City Attorney; and Robert K. McCord, City Manager, convened in a special meeting, the purpose of which was for "establishing a City School system."

Under date of July 10, the Mayor sought cooperation from the County Board of Supervisors, specifically the sale or lease of the school buildings located within the City.

At the July 14 meeting of the same City officials, the Mayor evidenced his dissatisfaction with the plan which this Court had ordered to be executed to accomplish school desegregation. The Council heard purported percentages of Negroes who would be in each school for the first seven grades under the plan approved by this Court, and there was evidenced a view that the plan was educationally unsound. The chairman of the City School Board advised the Council that approximately 500 County children could attend City schools if the City obtained the buildings wanted, i.e., the Emporia Elementary School and the Greensville County High School which white children of the County and City have traditionally attended. The Council unanimously decided to instruct the School Board of the City of Emporia to immediately take all steps to establish a school division for the City of Emporia.

At a special meeting held July 23, 1969, the Council adopted a resolution requesting the State Board of Education to authorize the creation of a school division for the City of Emporia.

The City School Board notified the County School Board that a separate school system for the City will be operated, that no City school children will attend the County system during the year 1969-70 and thereafter, and that the City would no longer pay a share of the cost of operating the County schools. The notification solicited the cooperation of the County School Board in making this transition which

was characterized as being "for the benefit of the entire community."

The City School Board has caused to be circulated and posted a notice dated July 31, 1969, requiring all parents of school age children residing in the City to register such children during the week of August 4-8 and inviting applications from out-of-city students who desire to attend Emporia City schools on a tuition, no transportation basis.

The City School Board's proposed operation of the schools would afford those students residing in the County the opportunity to attend a City school upon payment of certain tuition fees.

Certain members of the County School Board and members of the Board of Supervisors had knowledge of the foregoing events as and when they occurred and have met with members or representatives of the City Council and of the City School Board and discussed the plans of the City to withdraw from the County school system.

The Court further finds that a failure of this Court to enjoin the defendants would result in incalculable harm to those students residing in the County and would be disruptive to the effectiveness of the Court's previous order.

The Court further finds that the members of the School Board of Emporia have not functioned as such except for the purpose of consulting with the County Board in the selection of a superintendent of schools. They never acted in any manner for purposes of offering their assistance to the County Board in reference to a school plan to be submitted to this Court.

On the basis of the foregoing, the Court makes the following

CONCLUSIONS OF LAW

1. As a successor to the County School Board with respect to the duty to educate children of school age residing

in the City of Emporia, the City School Board would be and is bound by this Court's order requiring the County School Board to disestablish racial segregation in the public school system which it controlled and operated both when this suit was commenced and when said order was entered and to do so in accordance with the plan approved by this Court.

2. As persons in participation with the County School Board with respect to the cost of the school system, and they having received notice of this Court's said order, the Council of the City of Emporia, the members thereof, the Mayor of the City, the School Board of the City of Emporia, the members thereof, the County Board of Supervisors of Greensville County and the members thereof were and are bound by this Court's said order.

3. The establishment and operation of a separate public school system by the City of Emporia and the consequent withdrawal of children residing in that City from the public school system of Greensville County would be an impermissible interference with and frustration of this Court's said order.

4. The Council of the City of Emporia may not withhold its appropriate share of financial support for the operation of public schools by the County School Board of Greensville County when such would defeat or impair, the effectuation of the constitutional rights of the plaintiffs in the manner which this Court has directed.

Dated: 8-8-69

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

Order of District Court

[Entered and Filed on August 8, 1969]

For the reasons assigned in the Court's Findings of Fact and the Conclusions of Law, and deeming it proper so to do, it is ADJUDGED, ORDERED and DECREED that the School Board of the City of Emporia and the members thereof, viz: E. V. Lankford, Julian P. Mitchell, P. S. Taylor and G. B. Ligon, and their successors, and the officers, agents, servants, employees and attorneys of said Board, as well as George F. Lee, as Mayor of the City of Emporia, and his successors, and the Council of the City of Emporia and the members thereof, viz: William H. Ligon, L. R. Brothers, Jr., T. Cato Tillar, Fred A. Morgan, Julian C. Watkins, S. G. Keedwell, M. L. Nicholson, Jr., and Robert F. Hutcheson, and their successors, and the officers, agents, servants, employees and attorneys of said Council, be, and they hereby are, enjoined and restrained from any action which would interfere in any manner whatsoever with the implementation of the Court's order heretofore entered in reference to the operation of public schools for the student population of Greensville County and the City of Emporia.

This order shall be effective upon the plaintiffs' giving security in the sum of \$100.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined; and shall remain in full force and effect for a period of 140 days unless sooner modified, enlarged or dissolved.

Let the United States Marshal serve copies of this order upon each of the named defendants.

Dated: August 8, 1969

3:45 P.M.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

Va. Code Ann.

§ 22-7. *Joint schools for counties or for counties and cities or towns.*—The school boards of counties or of counties and cities, or of counties and towns operating as separate special school districts, may, with the consent of the State Board, establish joint schools for the use of such counties or of such counties and cities or of counties and towns operating as separate special school districts, and may purchase, take, hold, lease, convey and condemn, jointly, property, both real and personal, for such joint schools. Such school boards, acting jointly, shall have the same power of condemnation as county school boards except that such land so condemned shall not be in excess of thirty acres in a county or city for the use of any one joint school. The title of all such property acquired for such purposes shall vest jointly in such school boards of the counties or counties and cities or counties and towns operating as separate special school districts in such respective proportions as such school boards may determine, and such schools shall be managed and controlled by the boards jointly, in accordance with such rules and regulations as are promulgated by the State Board. However, such rules and regulations in force at the time of the adoption of a plan for the operation of a joint school shall not be changed for such joint school by the State Board without the approval of the local school boards.

§ 22-30. *How division made.*—The State Board shall divide the State into appropriate school divisions, in the discretion of the Board, comprising not less than one county or city each, but no county or city shall be divided in the formation of such division.

§ 22-34. *When school boards to meet jointly to appoint superintendent.*—When a school division is composed of a city and one or more counties, or two or more counties, the school boards composing the division must meet jointly and a majority vote of the members present shall be required to elect a superintendent.

§ 22-42. *Counties and magisterial districts as school districts.*—Each magisterial district shall, except where otherwise provided by law, constitute a separate school district for the purpose of representation. For all other school purposes, including taxation, management, control and operation, unless otherwise provided by law, the county shall be the unit; and the school affairs of each county shall be managed as if the county constituted but one school district; provided, however, that nothing in this section shall be construed to prohibit the levying of a district tax in any district or districts sufficient to pay any indebtedness, of whatsoever kind, including the interest thereon, heretofore or hereafter incurred by or on behalf of any district or districts for school purposes.

COUNTY SCHOOL BOARDS GENERALLY

§ 22-61. *How school board appointed; assignment of duties.*—The county school board shall consist of one member from each school district in the county, and in any county having a population not less than eighteen thousand and not more than twenty thousand and in any county having a population not less than thirty-three thousand and not more than thirty-five thousand, if the governing body thereof so adopts by resolution, not more than two members at large, and in any county having a population of more than forty thousand but less than forty thousand four hundred, one member at large, and in any county

having a population of more than thirteen thousand but less than thirteen thousand five hundred, one member at large, all appointed by the school trustee electoral board, provided that in towns constituting separate school districts and operated by a school board of three members, one of the members shall be designated annually by the town board as a member of the county school board. The members of the county school board from the several districts shall have no organization and duties except such as may be assigned to them by the school board as a whole.

§ 22-68. *Members must be residents.*—Each member of the county board at the time of his election shall be a bona fide resident of the magisterial district or town from which he is elected, and if he shall cease to be a resident of such district or town, his position on the county school board shall be deemed vacant, except in counties where magisterial districts have been abolished, in which case he may be appointed at large, but any member at large must be a bona fide resident of that county and upon his ceasing to be a resident of that county his position on the county school board shall be deemed vacant.

§ 22-72. *Powers and duties.*—The [county] school board shall have the following powers and duties:

(1) *Enforcement of school laws.*—To see that the school laws are properly explained, enforced and observed.

(2) *Rules for conduct and discipline.*—To make local regulations for the conduct of the schools and for the proper discipline of the students, which shall include their conduct going to and returning from school, but such local rules and regulations shall be in harmony with the general rules of the State Board and the statutes of this State.

(3) *Information as to conduct.*—To secure, by visitation or otherwise, as full information as possible about the conduct of the schools.

(4) *Conducting according to law.*—To take care that they are conducted according to law and with the utmost efficiency.

(5) *Payment of teachers and officers.*—To provide for the payment of teachers and other officers on the first of each month, or as soon thereafter as possible.

(6) *School buildings and equipment.*—To provide for the erecting, furnishing, and equipping of necessary school buildings and appurtenances and the maintenance thereof.

(6a). *Insurance.*—To provide for the necessary insurance on school properties against loss by fire or against such other losses as deemed necessary.

(7) *Drinking water.*—To provide for all public schools an adequate and safe supply of drinking water and see that the same is periodically tested and approved by or under the direction of the State Board of Health, either on the premises or from specimens sent to such Board.

(8) *Textbooks for indigent children.*—School boards shall provide, free of charge, such textbooks as may be necessary for indigent children attending public schools; in systems providing free textbooks, the cost of furnishing such textbooks may be paid from school operating funds or the textbook fund or such other funds as are available; in systems operating rental textbook systems, school boards shall waive rental fees, or in their discretion, may reimburse the rental textbook fund from school operating funds.

(9) *Costs and expenses.*—In general, to incur costs and expenses, but only the costs and expenses of such items as are provided for in its estimates submitted to the tax levying body without the consent of the tax levying body.

(10) *Consolidation of schools.*—To provide for the consolidation of schools whenever such procedure will contribute to the efficiency of the school system.

(11) *Other duties.*—To perform such other duties as shall be prescribed by the State Board or as are imposed by law.

BOARDS OF CITIES AND TOWNS

§ 22-89. *Appointment and term.*—The council of each city except as otherwise provided by the city charter shall, on or before July first, nineteen hundred and thirty, appoint three trustees for each school district in such city, whose term of office shall be three years, respectively, and one of whom shall be appointed annually. The first appointment hereunder shall be one for one year, one for two years, and one for three years, beginning July first, nineteen hundred and thirty, and thereafter all appointments shall be for three years. If a vacancy occurs in the office of trustee at any time during the term, the council shall fill it by appointing another for such part of the term as has not expired. Within thirty days preceding the day on which the term of such trustees shall expire by limitation, and within the like number of days preceding the day on which the term of any trustee shall expire by limitation in any subsequent year, such council shall appoint a successor to each such trustee in office, whose term shall commence when the term of predecessor shall have expired; provided, the office of any such trustee has not been abolished in redistricting the city; and, provided, that in the city of Norfolk the trustees shall be appointed in accordance with the provisions of § 22-89.1 rather than in accordance with the provisions of the city charter, and provided, further, that the common council of the city of Winchester shall select and appoint the school trustees for said city, and

that in all other respects the provisions of this section shall apply to the city of Winchester. All acts heretofore done by the school board of the city of Winchester are hereby validated.

§ 22-97. *Enumeration of powers and duties.*—The city school board shall have the following powers and duties:

(1) *Rules and regulations.*—To explain, enforce, and observe the school laws, and to make rules for the government of the schools, and for regulating the conduct of pupils going to and returning therefrom.

(2) *Method of teaching and government employed.*—To determine the studies to be pursued, the methods of teaching, the government to be employed in the schools, and the length of the school term.

(3) *Employment and control of teachers.*—To employ teachers on recommendation of the division superintendent and to dismiss them when delinquent, inefficient or in anywise unworthy of the position; provided, that no school board shall employ or pay any teacher from the public funds unless the teacher shall hold a certificate in full force, according to the provisions of §§ 22-203 to 22-206. It shall also be unlawful for the school board of any city, or any town constituting a separate school district, to employ or pay any teacher or other school employee related by consanguinity or affinity as provided in § 22-206. The exceptions and other provisions of that section shall apply to this section.

(4) *Suspension or expulsion of pupils.*—To suspend or expel pupils when the prosperity and efficiency of the school make it necessary.

(5) *Free textbooks.*—To decide what children, wishing to enter the schools of the city, are entitled by reason of

poverty of their parents or guardians to receive textbooks free of charge and to provide for supplying them accordingly.

(6) *Establishment of high and normal schools.*—To establish high and normal schools and such other schools as may, in its judgment, be necessary to the completeness and efficiency of the school system.

(7) *Census.*—To see that the census of children required in § 22-223 is taken within the proper time and in the proper manner.

(8) *Meetings of board.*—To hold regular meetings and to prescribe when and how special meetings may be called.

(9) *Meetings of people.*—To call meetings of the people of the city for consultation in regard to the school interests thereof, at which meetings the chairman or some other member of the board shall preside if present.

(10) *Schoolhouses and property.*—To provide suitable schoolhouses, with proper furniture and appliances, and to care for, manage, and control the school property of the city. For these purposes it may lease, purchase, or build such houses according to the exigencies of the city and the means at its disposal. No schoolhouse shall be contracted for or erected until the plans therefor shall have been submitted to and approved in writing by the division superintendent of schools, and no public school shall be allowed in any building which is not in such condition and provided with such conveniences as are required by a due regard for decency and health; and when a schoolhouse appears to the division superintendent of schools to be unfit for occupancy, it shall be his duty to condemn the same, and immediately to give notice thereof, in writing, to the chairman of the school board, and thenceforth

no public school shall be held therein, nor shall any part of the State or city fund be applied to support any school in such house until the division superintendent shall certify, in writing, to the city school board that he is satisfied with the condition of such building, and with the appliances pertaining thereto.

(11) *Visiting schools.*—To visit the public free schools within the city, from time to time, and to take care that they are conducted according to law, and with the utmost efficiency.

(12) *Management and control of funds.*—To manage and control the funds of the city made available to the school board for public schools, to provide for the pay of teachers and of the clerk of the board, for the cost of providing school-houses and the appurtenances thereto and the repairs thereof, for school furniture and appliances, for necessary textbooks for indigent children attending the public free schools, and for any other expenses attending the administration of the public free school system, so far as the same is under the control or at the charge of the school officers.

(13) *Approval and payment of claims.*—To examine all claims against the school board, and when approved, to order or authorize the payment thereof. A record of such approval, order or authorization shall be made in the proceedings of the board. Payment of each claim shall be ordered or authorized by a warrant drawn on the treasurer or other officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds made available to the school board of such city. The warrant shall be signed by the chairman or vice-chairman of the board and countersigned by the clerk or deputy clerk thereof, payable to the person or persons,

firm or corporation entitled to receive such payment. There shall be stated on the face of the warrant the purpose or service for which such payment is drawn and also that such warrant is drawn pursuant to an order entered or authority granted by the board on the day of

The warrant may be converted into a negotiable check when the name of the bank upon which the funds stated in the warrant are drawn or by which the check is to be paid is designated upon its face and is signed by the treasurer, deputy treasurer or other officer of the city charged by law with the responsibility for the receipt, custody and disbursement of the funds of the city.

The board may, in its discretion, appoint an agent and a deputy agent to act for the agent in his absence or inability to perform this duty by resolution spread upon the record of its proceedings to examine and approve such claims and, when approved by him or his deputy to order or authorize the payment thereof. A record of such approval, order or authorization shall be made and kept with the records of the board. Payment of each such claim so examined and approved by such agent or his deputy shall be ordered or authorized by a warrant drawn on the treasurer or other officer of the city charged by law with the responsibility for the receipt, custody, and disbursement of the funds made available to the school board of the city. The warrant shall be signed by such agent or his deputy and countersigned by the clerk or deputy clerk of the board, payable to the person or persons, firm or corporation entitled to receive such payments; provided, however, that when the agent appointed by the board is the division superintendent of schools and the division superintendent and clerk is one and the same person, all such warrants shall be countersigned by the chairman or vice-chairman of the board; provided further that when

the deputy agent and deputy clerk is one and the same person the warrant shall be countersigned by either the clerk or the agent of the board. There shall be stated on the face of the warrant the purpose or service for which such payment is made and also that such warrant is drawn pursuant to authority delegated to such agent or his deputy by the board on the day The warrant may be converted into a negotiable check in the same manner as is prescribed herein for warrants ordered or authorized to be drawn by the school board. The board shall require such agent and his deputy to furnish the city a corporate surety bond conditioned upon the faithful performance and discharge of the duties herein assigned to each such official. The board shall fix the amount of such bond or bonds and the premium therefor shall be paid out of the funds made available to the school board of such city.

(14) *Report of expenditures and estimate of necessary funds.*—It shall be the duty of the school board of every city, once in each year, and oftener if deemed necessary, to submit to the council, in writing, a classified report of all expenditures and a classified estimate of funds deemed to be needed for the proper maintenance and growth of the public schools of the city, and to request the council to make provisions by appropriation or levy pursuant to § 22-126, for the same.

(15) *Other duties prescribed by State Board.*—To perform such other duties as shall be prescribed by the State Board or are imposed by other parts of this title.

(16) *Acquisition of land.*—City school boards shall, in general, have the same power in relation to the condemnation or purchase of land and to the vesting of title thereof, and also in relation to the title to and management of

property of any kind applicable to school purposes, whether heretofore or hereafter set apart therefor, and however set apart, whether by gift, grant, devise, or any other conveyance and from whatever source, as county school boards have in the counties, and in addition thereto, they shall have the further right and power to condemn not in excess of fifteen acres of land for any one school when necessary for school purposes, except that when dwellings or yards are invaded not more than five acres may be condemned for any one school; provided, however, that the school board of any city having a population of more than eighty-six thousand and not more than ninety thousand and any city having a population of more than seventy-five thousand but less than eighty-seven thousand, may have the right and power to condemn not in excess of forty-five acres when necessary for school purposes.

(17) *Consolidation of schools.*—To provide for the consolidation of schools whenever such procedure will contribute to the efficiency of the school system.

§ 22-99. *When city contracts with county to furnish facilities.* In the event that a city through authority granted in its charter enters into contract with the county school board of the adjacent county for furnishing public school facilities for the city where the county and city are constituted as one school system for the establishment, operation, maintenance and management of the public schools within the county and city, the school board of the county shall consist of one representative from each magisterial district of the county and each magisterial district (or ward) of the city, such incumbent to be appointed by the county school trustee electoral board, as provided by § 22-61; provided further that the members of the county school board representing the city shall be selected from a list of three citizens from each district (or ward) to be submitted by the city council of the city; any other law to the contrary notwithstanding.

BOARDS OF DIVISIONS COMPRISING TWO OR MORE
POLITICAL SUBDIVISIONS

§ 22-100.1. *Single school board authorized.*—When the State Board of Education has created a school division, composed of two or more counties or one or more counties with one or more cities, the supervision of schools in any such school division may be vested in a single school board under the conditions and provisions as hereinafter set forth.

§ 22-100.2. *How board established.*—The school boards of such counties, county and city or counties and cities, comprising such school division, by a majority vote, may, with the approval of the governing bodies of such counties, or counties and cities, and the State Board of Education, establish such division school board in lieu of the school boards as at present constituted for the counties, county and city or counties and cities of such school division. Provided, however, that no such division shall be created which includes a county in which there is located a town operating as a separate school district.

§ 22-100.3. *How composed; appointment and terms of members; vacancies.*—Such division school board shall be composed of not less than six nor more than nine trustees, with an equal number of members from each county or city of the division and with a minimum board of six members, who shall be appointed by the county board of supervisors for a county and the city council for a city. Upon the creation of such school division there shall be appointed by the appropriate appointing bodies the required number of members to the division school board who shall serve until the first day of July next following the creation of

such division. Within sixty days prior to that day each appointing body shall appoint the required number of members of the division school board as follows: If there be three members, one shall be appointed for a term of two years, one for a term of three years, and one for a term of four years; if there be four members, one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, and one for a term of four years. Within sixty days prior to the first day of July in each and every year thereafter there shall be appointed by the appropriate appointing body for a term of four years beginning the first day of July next following their appointment, successors to the members of the division school board for their respective counties or cities, whose terms expire on the thirtieth day of June in each such year. The exact number of trustees for a county or city shall be determined by the governing bodies concerned within the limits above provided. Any vacancy occurring in the membership of the division school board from any county or city shall be filled for the unexpired term by the appointing body of such county or city. The governing bodies concerned shall jointly select for a term of four years one person who shall be a member of the division school board only for the purpose of voting in case of an equal division of the regular members of the board on any question requiring the action of such board. Such person shall be known as the tie breaker.

If the governing bodies are not able to agree as to the person who shall be the tie breaker, then upon application by any of the governing bodies involved to a circuit court having jurisdiction over a county or city embraced in such school division, the judge thereof shall name the tie breaker and his decision shall be final.

Judgment**UNITED STATES COURT OF APPEALS****FOR THE FOURTH CIRCUIT****No. 14,552**

PECOLA ANNETTE WRIGHT, et al.,***Appellees,*****v.****COUNCIL OF THE CITY OF EMPORIA AND THE MEMBERS THEREOF,
AND SCHOOL BOARD OF THE CITY OF EMPORIA AND THE
MEMBERS THEREOF,*****Appellants.***

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court the the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and the case is remanded to the United States District Court for the Eastern District of Virginia, at Richmond, with instructions to dissolve the injunction; and because of the possibility that Emporia might institute a plan for transferring students into the city system from the county system resulting in resegregation, or that the hiring of teachers to serve the Emporia school system might result in segregated faculties, the district court is directed to retain jurisdiction.

/s/ SAMUEL W. PHILLIPS

Clerk

FILE COPY

Supreme Court, U.S.

FILED

JUN 19 1971

E. ROBERT SEAWER, CLERK

Supreme Court of the United States

October Term, 1970

~~N. 1720~~

70-188

PECOLA ANNETTE WRIGHT, ET AL.,

Petitioners,

v.

COUNCIL OF THE CITY OF EMPORIA, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

October Term, 1970

No. 1730

• PECOLA ANNETTE WRIGHT, ET AL.,
Petitioners,

v
COUNCIL OF THE CITY OF EMPORIA, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The petition accurately describes the opinions of the courts below except that it indicates that Judge Sobeloff dissented in this case. Judge Sobeloff did not participate in the appeal of this case from the District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions and statutes referred to in the petition, the case involves:

1. VA. CONST. art. IX, § 133, which is set forth in the appendix to this brief in opposition at R.A. 1.*

2. VA. CODE ANN. § 22-93 (1950), which provides:

The city school board of every city shall establish and maintain therein a general system of public free schools in accordance with the requirements of the Constitution and the general educational policy of the Commonwealth.

3. VA. CODE ANN. §§ 15.1-978 through 15.1-1010 (1950), which relate to the transition of towns to cities in the Commonwealth of Virginia. VA. CODE ANN. § 15.1-982 (1950), as in effect on July 31, 1967, is set forth in part at R.A. 2.

QUESTIONS PRESENTED

The preliminary statement contained in the section of the petition entitled "Questions Presented" (P. 2) is inaccurate and incomplete and thus provides a misleading foundation upon which the presentation of the questions involved is based.

The City of Emporia is not located within Greensville County. While it is surrounded by Greensville County, the City is politically, governmentally, and geographically independent of the County.

Additionally, the one sentence summaries of the reasons for the holdings of the courts below are, of course, incomplete and accordingly they sacrifice accuracy for brevity.

* The following designations will be used in this brief:

R.A.—Appendix to respondent's brief in opposition

P. —Petition for writ of certiorari

P.A.—Appendix to petition for writ of certiorari

The questions involved are:

1. Because of the unique independent status of cities in the Commonwealth of Virginia, are the issues here involved of such nationwide importance as to warrant a review and decision by this Court?

2. May the City of Emporia, Virginia, an independent political subdivision of the Commonwealth of Virginia, which was created in 1967 under long-standing state law for reasons unrelated to public school desegregation, operate a racially unitary and superior quality school system independent of the County of Greenville, which is a separate independent political subdivision of the Commonwealth?

3. Was the Court of Appeals correct in deciding that the constitutionally protected rights of the petitioners would not be violated if the City of Emporia operated a unitary school system independent of that operated by the County of Greenville; which decision was based upon the factual findings of the District Court?

STATEMENT

In their "Statement" petitioners call attention to the fact that this is "one of three cases decided together by the Court of Appeals involving the relationship between desegregation and the creation of new school districts" (P. 3). While this is true, it is important to note at the outset that there are various significant differences between this case, which involves a city in the Commonwealth of Virginia, and the other two cases, which involve school districts in the State of North Carolina. A detailed explanation of the Virginia system of local government is contained in a later section of this brief. At this point, however, attention is called to the fact that the City of Emporia was created under long-standing Virginia law and is completely independent of the County of Greenville for all purposes,

4
save one.¹ On the other hand, the North Carolina school districts were created pursuant to special acts of the North Carolina General Assembly adopted in 1969 and the areas involved are still a part of the county or counties out of which they were carved for all governmental purposes other than education.

On pages 4 and 5 of the petition, footnote 4, the background of the litigation is set forth. Some elaboration is necessary. The evidence was uncontradicted that the motivating factor behind the transition of Emporia from a town to a city was the desire of Emporia's elected officials to have the city receive the benefit of the state sales tax that had recently been enacted and to eliminate other economic inequities. There has been no charge by the plaintiffs that the decision to become a city was in any way motivated by the school desegregation situation. There was no finding by the District Court to impugn the motives or purposes of the City in effecting this transition. The Court of Appeals so indicated (P.A. 4a). Thus, it is clear that this is not a case in which an area has been "carved out" for the purpose of avoiding school desegregation.

Further, petitioners indicate that at the time Emporia became a city it was free to operate its own independent school system, but chose not to do so. The courts below were satisfied that Emporia considered so doing at that time, but determined that such was not practical immediately after transition.

The Court of Appeals stated:

Emporia considered operating a separate school system but decided it would not be practical to do so immediately at the time of its independence. There was an effort to work out some form of joint operation with

¹ It shares with the County the cost of the circuit court and its clerk, the commonwealth's attorney and the sheriff.

the Greenville County schools in which decision making power would be shared. The county refused. Emporia finally signed a contract with the county on April 10, 1968, under which the city school children would attend schools operated by the Greenville County School Board in exchange for a percentage of the school system's operating cost. Emporia agreed to this form of operation only when given an ultimatum by the county in March 1968 that it would stop educating the city children mid-term unless some agreement was reached.

The District Court held:

Ever since Emporia became a city consideration has been given to the establishment of a separate city system. A second choice was some form of joint operating arrangement with the county, but this the county would not assent to. Only when served with an "ultimatum" in March of 1968, to the effect that city students would be denied access to county schools unless the city and county came to some agreement, was the contract of April 10, 1968, entered into.

The contract of April 10, 1968, was limited to a term of four years expiring on July 1, 1971 (P.A. 73a).

On pages 6 and 7 of the petition, footnote 6, petitioners undertake to explain the Virginia system of school divisions and school districts. They erroneously state that when Emporia became a city "it could not operate a separate school system unless it was named a separate school division by the State Board." The Constitution of Virginia requires that supervision of schools in *each* county and city shall be vested in a school board. VA. CONST. art. IX, § 133 (R.A. 1). The Code of Virginia *requires* that the city school board of every city shall establish and maintain therein a system of schools. VA. CODE ANN. § 22-93 (1950)

(*supra* at 2). It sets forth the duties and powers of the city school boards. VA. CODE ANN. § 22-97 (1950) (P.A. 91a). While it is possible for a city and a county to be in one school division, each has its own school district, its own school board and each operates its own system. In such cases the boards are required to meet together only for the purpose of appointing a superintendent of the division who serves both boards but who administers each system separately. VA. CODE ANN. § 22-34 (1950) (P.A. 87a). The Constitution of Virginia permits supervision of such division to be vested in a single school board in which event the separate school boards cease to exist. VA. CONST. art. IX, § 133 (R.A. 1). The Code provides that such may occur only upon approval of the school board and the governing body of each of the political subdivisions involved. VA. CODE ANN. § 22-100.2 (1950) (P.A. 97a). The courts below found that the County refused to agree to a jointly operated system (P.A. 4a, 75a). It is therefore clear that under state law the City of Emporia has the power and duty to operate its own system of schools as a separate school district. The City sought to be constituted a separate division only so that it could employ its own superintendent (Transcript of the Proceedings, December 18, 1969, at 27).

On pages 7, 8, and 9 of the petition, reference is made to the reasons of the City for attempting to establish its own system and to the findings of the District Court at the time it granted the temporary injunction on August 8, 1969. At that same hearing, officials of the City also testified that the City's primary motive in seeking to establish its own unitary system was to afford better educational opportunities for its children than would be provided by the County of Greenville (Transcript of the Proceedings, August 8, 1969, at 120, 163, 164). However, the best summary of the purposes of the City is provided by the opinion

of the District Court on March 2, 1970, after it had heard the evidence at the hearing on the permanent injunction in December 1969:

The city clearly contemplates a superior quality educational program. (P.A. 67a)

* * *

Emporia's position, reduced to its utmost simplicity, was to the effect that the city leaders had come to the conclusion that the county officials, and in particular the board of supervisors, lacked the inclination to make the court-ordered unitary plan work. The city's evidence was to the effect that increased transportation expenditures would have to be made under the existing plan, and other additional costs would have to be incurred in order to preserve quality in the unitary system. The city's evidence, uncontradicted, was to the effect that the board of supervisors, in their opinion, would not be willing to provide the necessary funds. (P.A. 75a)

* * *

The Court does find as a fact that the desire of the city leaders, coupled with their obvious leadership ability, is and will be an important facet in the successful operation of any court-ordered plan. (P.A. 76a)

* * *

This Court is satisfied that the city, if permitted, will operate its own system on a unitary basis. (P.A. 77a)

It is these findings of the District Court, which were made after the evidence was fully developed, that are controlling. Obviously, they supersede any conflicting findings made after the expedited and peremptory hearing on the temporary injunction.

On page 11 of the petition, petitioners state that the District Court concluded that the "establishment of separ-

ate systems would plainly cause a substantial shift in the racial balance." The facts upon which this conclusion is based are these:

Combined system	66% black; 34% white
Separate systems	
County	72% black; 28% white
City	52% black; 48% white
	(P.A. 6a)

Petitioners then state that "the District Court concluded that the operation of separate school systems *would* have *serious* adverse impact on the provisions of the plaintiffs' constitutional rights" (emphasis added) (P. 11). The District Court simply did not say that. Rather it said:

This Court is most concerned about the *possible* adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs. (Emphasis added.) (P.A. 78a)

It also said:

But this [operation of a unitary system by the City] does not exclude the *possibility* that the act of division *might* have foreseeable consequences that this Court ought not to permit. (Emphasis added.) (P.A. 77a)

It is clear that the District Court considered any adverse effects of separate systems to be purely speculative.

Petitioners next proceed to summarize the majority opinion of the Court of Appeals (P. 12, 13). That summary is incomplete and therefore misleading. On page 13 of the petition, petitioners have selected statements from the opinion of the Court of Appeals and have placed them together in a manner that does not accurately depict the context in

which they were made. The majority did not conclude that Emporia would not be a "white island" *because* "there will be a substantial majority of black students in the county system." It concluded that Emporia would not be a white island because of the obvious and uncontradicted fact that it will have a system composed of a majority of black students. It did not conclude that "the effect of separation does not demonstrate that the primary purpose of the separation was to perpetuate segregation" solely because of the racial makeup of the two systems. It reached this conclusion based on all the findings of the District Court with respect to all the evidence presented.

Next, the petitioners state that "[S]ince the district court made no explicit 'finding of discriminatory purpose,' and because the school district officials advanced non-racial motives for the creation of a separate district," the majority held the injunction by the District Court to have been improvidently entered (P. 13). Again, the decision of the majority was not based merely on those grounds; rather, it was based on the record as a whole. It should be pointed out that not only did the Court of Appeals state "that there was no finding of discriminatory purpose," but it also stated that "the [district] court noted its satisfaction that the city would, if permitted, operate its own system on a unitary basis" (P.A. 8a).

The following is a summary of what the Court of Appeals did, in fact, hold.

It stated that if the shift in racial balance "is great enough to support an inference that the purpose" of the new school district "is to perpetuate segregation," the new district must be enjoined (P.A. 2a).

It stated:

The creation of new school districts may be desirable and/or necessary to promote the legitimate state inter-

est of providing quality education for the state's children. The refusal to allow the creation of any new school districts where there is any change in the racial makeup of the school districts could seriously impair the state's ability to achieve this goal.

* * *

If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation. (P.A. 3a)

The Court of Appeals then proceeded to examine the evidence and the findings of the District Court on the question of the purpose of Emporia in becoming a city and in seeking its own school system. However, of equal importance, it also examined the *effect* of the so-called separation² of the school systems. It is impossible to determine the subjective purpose without considering the objective effect.

First, the Court of Appeals found that the purpose of Emporia in attaining city status was not to prevent or diminish integration. The Court stated that at the time Emporia became a city, July 31, 1967, "a freedom of choice plan approved by the district court" was in effect and the decision in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), "could not have been anticipated by Emporia, and indeed, was not envisioned by this

² Actually, this case involves "consolidation" rather than "separation" since the systems were legally separated when Emporia became a city on July 31, 1967. Only because of the contract which expires on June 30, 1971, under its own terms, did Greensville County educate children of Emporia in its system.

court." (P.A. 4a). The purpose of Emporia in becoming a city was to receive the benefits of the newly enacted sales tax and to eliminate other economic inequities (P.A. 4a; Transcript of the Proceedings, August 8, 1969, at 118, 119).

Next, the Court of Appeals examined the purpose and effect of Emporia's decision in 1969 to operate its own system. After pointing out that if Emporia did so the City would have a majority of black students in its system and that a six percent shift of the racial balance of the Greenville County school system would be created, the Court stated:

Not only does the *effect* of the separation not demonstrate that the primary purpose of the separation was to perpetuate segregation, but there is strong evidence to the contrary. Indeed, the district court found that Emporia officials had other purposes in mind. (Emphasis added.) (P.A. 6a)

The Court of Appeals then referred to the evidence of Dr. Neil H. Tracey, Professor of Education at the University of North Carolina, who testified that his studies were made with the understanding that it was not the intent of the City to resegregate³; that an examination of the proposed budget for the Greenville County schools indicated that it not only would not provide the funds required for increased transportation expenses necessitated by the pairing plan, but it would not provide the funds to keep up with the increased costs of operation due to inflation; that the tentative budget adopted by Emporia would provide increased revenues to increase the quality of education for its students; and that the proposed system of Emporia would be educationally superior to Greenville's system (P.A. 7a).

³ Transcript of the Proceedings, December 18, 1969, at 68.

The Court of Appeals pointed out that "Emporia proposed lower student teacher ratios, increased per pupil expenditures, health services, adult education, and the addition of a kindergarten program." (P.A. 7a).

The Court of Appeals then stated:

In sum, Emporia's position, referred to by the district court as "uncontradicted," was that effective integration of the schools in the whole county would require increased expenditures in order to preserve education quality, that the county officials were unwilling to provide the necessary funds, and that therefore the city would accept the burden of educating the city children (P.A. 7a).

Further, the Court of Appeals pointed out that because of the unusual nature of the organization of city and county governments in Virginia under which counties and cities are completely independent, Emporia had no representation on the governing body of the County or on the school board of the County. Thus, neither Emporia nor its residents have any means by which they can exert any influence or control whatever with respect to the education of the school children of the City (P.A. 7a, 8a). In conclusion, the Court of Appeals stated:

The district court must, of course, consider evidence about the need for and efficacy of the proposed action to determine the good faith of the state officials' claim of benign purpose. In this case, the court did so and found explicitly that "[t]he city clearly contemplates a superior quality education program. It is anticipated that the cost will be such as to require higher tax payments by city residents." 309 F. Supp. at 674. Notably, there was no finding of discriminatory purpose, and instead the court noted its satisfaction that the city would, if permitted, operate its own system on a unitary basis (P.A. 8a).

The "Statement" portion of the petition concludes by setting out rather extensive quotations from the dissenting opinions of Judges Sobeloff and Winter.⁴

REASONS FOR DENYING WRIT

I.

The Issues Involved Are Not Of Critical Importance In The Process Of School Desegregation Because Of The Unique Structure Of Local Government In Virginia.

Petitioners are not correct when they state on page 15 of the petition that "[T]his case arises out of the repeated failure of the County School Board of Greenville County to propose an acceptable desegregation plan." Rather it arises out of the effort of petitioners to restrain the independent City of Emporia from operating its own unitary school system as all other cities in Virginia are permitted to do.⁵

This case is *not* the usual desegregation suit involving the constitutional validity of a desegregation plan (*e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, No. 281 O.T. 1970).

It is *not* a case where school district lines have been gerrymandered to affect the racial makeup of schools (*e.g.*,

⁴ Again, petitioners indicate that Judge Sobeloff dissented in the Emporia case though he neither participated nor voted in it. If any significance can be attached to his views so far as this case is concerned, then it should be noted that Judge Butzner, who likewise did not participate in it, was a part of the majority in the *United States v. Scotland Neck City Bd. of Educ.*, _____ F.2d _____ (4th Cir. 1971), and must, therefore, be assumed to be in accord with the views of the majority in the Emporia case.

⁵ The District Court found that Emporia contemplated operating "a superior quality educational program" (P.A. 67a) and would, if permitted by the courts, "operate its own system on a unitary basis" (P.A. 77a).

Haney v. County Bd. of Educ., 419 F.2d 920 (8th Cir. 1969)).

It is *not* a case where a school district within a county or city has been divided by carving out a new school district consisting of primarily white students (*e.g.*, *Burleson v. County Bd. of Election Comm'rs*, 432 F.2d 1356 (8th Cir. 1970)).

It is *not* a case where a new city or school district has been created by a special act of a state legislature (*e.g.*, *United States v. Scotland Neck City Bd. of Educ.*, F.2d, Nos. 14929 and 14930 (4th Cir. 1971)).

Rather it is a case in which the independent City of Emporia, which became such on July 31, 1967, under general laws existing in Virginia since at least 1892⁶, is seeking to operate its own school system, independently of that of the county of which it was a part prior to July 31, 1967, as all other cities in Virginia are entitled to do.

The decision of the Court of Appeals in this case does not constitute a precedent that would have wide spread application or effect in the area of school desegregation because of the unique structure of local government in Virginia and because of the factual context from which the case arises.

In Virginia, counties and cities are independent of each other politically, governmentally and geographically.

⁶ The present Code of Virginia provides that a town upon attaining a population of 5,000 may elect to become a city of the second class for following the procedures set forth in the Code. Title 15.1, ch. 22, *Va. Code Ann.* (1950), as amended. The law has been substantially the same since at least 1892. *Acts of Assembly*, 1891-1892, ch. 595, at 934. Thus it is clear that the provisions under which the Town of Emporia acted to become a city have long been a part of the law in Virginia and were not enacted in any way as a result of the school desegregation suits or for any other racial reasons.

City of Richmond v. County Bd., 199 Va. 679, 684, 101 S.E.2d 641, 644 (1958)

It is the only state in the United States having such a statewide system of local government.⁷

In *Murray v. Roanoke*, 192 Va. 321, 324, 64 S.E.2d 804, 807 (1951), the Virginia court stated:

In Virginia, counties and cities are separate and distinct legal entities. . . . Citizens of the counties have no voice in the enactment of city ordinances, and conversely citizens of cities have no say in the enactment of county ordinances.

That this has been the law historically in Virginia is demonstrated by *Supervisors v. Saltville Land Co.*, 99 Va. 640, 39 S.E. 74 (1901).

This principle is applicable to a city that became such under the provisions of the law providing for the transition of towns to cities. In *Colonial Heights v. Chesterfield*, 196 Va. 155, 82 S.E.2d 566, 572 (1954), the Supreme Court of Appeals held:

The town, upon becoming a city, separates from a political subdivision of which it was a part and becomes an independent political subdivision, except as to certain joint services specified in Code, § 15.104 [now § 15.1-1005].

Schools are not listed among the services specified in § 15.1-1005—that section is limited to the sharing of the costs of the circuit court and its clerk, the commonwealth's attorney, and the sheriff.

The Constitution of Virginia has, since 1928, vested the supervision of county schools in the county school boards

⁷ C. Bain, "A Body Incorporate"—*The Evolution of City-County Separation in Virginia* ix, 23, 27, 35 (1967); C. Adrian, *State and Local Governments* 249 (2d ed. 1967).

and the supervision of city schools in the city school boards. VA. CONST. art. IX, § 133 (R.A. 1).

Since at least 1919 the Code of Virginia has affirmatively required the city school boards to establish and maintain a system of schools in each city of the Commonwealth. VA. CODE ANN. § 22-93 (1950).

In *School Bd. v. School Bd.*, 197 Va. 845, 91 S.E.2d 654 (1956), dealing with the transition of a town to a city, the Supreme Court of Appeals of Virginia held that upon transition the new city is required by law to maintain its own school system.⁸

The Court of Appeals below stressed the importance of the unusual nature of local government in Virginia and the fact that because of it Emporia has no representation on either the governing body or the school board of the County of Greensville (P.A. 7a). If Emporia were to be compelled to remain tied to Greensville County, it would be helpless to exert any influence or control with respect to the school system attended by its children.

Since no other state has such a system of local government, this case is not of nationwide significance.⁹

⁸ "As a town, Covington was a part of Alleghany County whose public schools were operated by the county school board. When Covington became a city it ceased to be a part of the county, became completely independent governmental subdivision, and was required by law to maintain its own school system," 197 Va. at 847, 91 S.E.2d at 656.

⁹ While the details of all the cases cited on page 17, footnote 10, of the petition are not known to counsel for respondent, it is noted that none arise from the State of Virginia. Because of the unique structure of local government in Virginia, the Emporia case could have little, if any, bearing on those cases. The case of *Burleson v. County Bd. of Election Comm'rs.*, 432 F.2d 1356 (8th Cir. 1970), it is distinguished on page 20 of this brief.

II.

**Decision Of The Court Of Appeals Below Is Not In Conflict With
Rulings Of This Court And Another Court Of Appeals.**

Petitioners assert that the decision of the Court of Appeals for the Fourth Circuit is in conflict with the decision of this Court in *Green v. County School Bd.*, 391 U.S. 430 (1968), and with the decision of the Court of Appeals for the Eighth Circuit in *Burleson v. County Bd. of Election Comm'rs*, 432 F.2d 1356 (8th Cir. 1970). Reference is also made to the decision of this Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, No. 281 O.T. 1970.

An analysis of those decisions reveals that there is no conflict between them and the decision of the Court of Appeals below. Rather it is in complete accord with the principles enunciated by this Court in *Green* and in *Swann*. In making such an analysis consideration must be given to the facts of each case since principles of law cannot be applied in the abstract.

1. *GREEN V. COUNTY SCHOOL BD.*, 391 U.S. 430 (1968)
and *SWANN V. CHARLOTTE-MECKLENBURG BD. OF
EDUC.*, No. 281 O.T. 1970

In *Green* this Court held that freedom of choice plans could not be approved unless they *result* in the dismantling of dual systems. It there held that such a plan was not working in New Kent and thus could not be accepted.¹⁰

In *Swann* this Court examined the powers of district courts to require busing of children between attendance

¹⁰ New Kent County had only two schools, one on each side of the county. There were 740 Negroes and 550 white students in the system. After freedom of choice had been in effect three years, one school remained all Negro and the other school had all the white students together with 115 Negro students.

zones of large metropolitan school systems as an aid to desegregation.¹¹

Several important principles were established by those decisions with which the decision of the Court of Appeals below is in complete accord.

First, with respect to objectives, this Court held in *Green* that a unitary, nonracial system of schools is the ultimate end to be brought about (391 U.S. at 436) and in *Swann* that the objective is to eliminate from public schools all vestiges of state-imposed segregation (Slip Op. at 10).

In the instant case the City of Emporia would have a unitary, nonracial system of public education composed of approximately 52 percent black and 48 percent white. The Court of Appeals (P.A. 6a) and the District Court (P.A. 74a, 75a) so found. The County of Greenville would also have such a system composed of approximately 72 percent black and 28 percent white (P.A. 6a).

Second, this Court held in *Green* (391 U.S. at 439) and in *Swann* (Slip Op. at 23) that there is no *one* way to accomplish the objectives and that each case must be judged in light of the circumstances present and the options available.

In accordance with that principle, the Court of Appeals below recognized that flexibility in the operation of the school system is both desirable and permissible (P.A. 8a).

Third, this Court stated in *Green* that a plan which has been adopted in good faith and which has the real prospect of resulting in a unitary system "at the earliest practicable date . . . may be said to provide effective relief" (291 U.S. at 439).

In *Swann* the Court recognized that at some point school

¹¹ The *Swann* case did not involve the interchange of children between independent school districts, but rather involved the interchange of students between attendance zones contained in one school system.

systems will be "unitary" and that subsequently intervention by district courts should not be necessary in the absence of a deliberate scheme to affect the racial composition of the schools (Slip Op. at 28).

Thus, it is clear that in two of the most recent decisions by this Court in school desegregation cases the elements of the "good faith" and of the "purpose" of the local authorities are considered to be important factors in determining the acceptability of a course of action. Even the dissenting judge in this case and Judge Sobeloff in the *Scotland Neck* case laid great emphasis upon the motive and purpose of the local authorities (P.A. 11a, 28a). Consideration by the Court of Appeals of the purpose of Emporia in attempting to set up its own system was clearly in accord with the decisions of this Court. Based on the findings of the District Court, the Court of Appeals held that the primary purpose of the separation was to provide better education and that the local authorities acted in good faith (P.A. 6a, 8a).

It should also be noted that this Court in *Brown II* recognized that consideration by the courts of the good faith of school authorities was both necessary and proper.¹²

Fourth, this Court in *Green* stated that school boards must come forward with plans that promise realistically to work now (291 U.S. at 438).

In *Swann* the Court said that a plan is to be judged by its effectiveness (Slip Op. at 21).

The Court of Appeals below complied with the mandate that a plan is to be judged by its effectiveness (P.A. 6a, 8a). While it stressed the importance of the purpose and good faith of the local authorities, it recognized that those factors must be judged in light of results. It further recog-

¹² *Brown v. Board of Educ.*, 349 U.S. 294 (1955), at 299.

nized that whether a plan will work or be effective means a good deal more than mathematical racial ratios.

In summary, the decision of the Court of Appeals below is in complete harmony with the decisions of this Court.

2. *BURLESON V. COUNTY BD. OF ELECTION COMM'RS*, 432 F.2d 1356 (8th Cir. 1970)

In the *Burleson* case, by per curiam opinion, the Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the Eastern District of Arkansas.¹³

That case is clearly distinguishable upon its facts from the Emporia case.

First, in *Burleson* the question was whether the Hardin Area of the Dollarway School District of Jefferson County, Arkansas, would be permitted to secede from that particular district and establish a new district *within* the same county. Apparently, in addition to the county board of education, each school district had its own "board of directors." For all purposes other than schools, it is assumed that the Hardin Area would remain a part of Jefferson County. In the instant case, the City of Emporia, under the law of Virginia, is already independent of Greensville County—politically, governmentally, and geographically.

Next, in the *Burleson* case the district court found:

The population of the Area is almost exclusively white. In the fall of 1969 270 students residing in the Area were in attendance in the schools of the District, and only 5 of those students were Negroes.

308 F. Supp. at 353.

In the instant case, slightly over 50 percent of the stu-

¹³ 308 F. Supp. 352 (E.D. Ark. 1970).

dents residing in Emporia are Negro. Thus, while the Hardin system would be composed almost entirely of white children, the Emporia system would be composed of almost an equal number of Negro and white children.

In *Burleson* the district court held that

... as of this time and in the *existing circumstances* the proposed succession cannot be permitted and will be enjoined (Emphasis added).

308 F. Supp. at 358.

III.

Decision Of The Court Of Appeals Below Was Plainly Right.

This Court said in *Swann* that "[O]nce a right and a violation have been shown," the district court has broad powers to remedy the wrong; that "it is important to remember that judicial powers may be exercised only on the basis of constitutional violation"; and that "[J]udicial authority enters only when local authority defaults."¹⁴ It further said:

The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Slip Op. at 13.

According to *Green*, the constitutional right of the plaintiff is to attend a unitary, nonracial system. According to *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969), at 21, it is the duty of local school authorities not to operate a dual system based on race or color, and . . . to operate as [a] unitary school system[s] within which no person is to be effectively excluded from any school because of race or color.

¹⁴ *Swann*, Slip Op. at 11.

Here, there has been no violation of the constitutional rights of the plaintiffs as enunciated by this Court; likewise, there has been no default by the Emporia authorities. There has been no finding to the contrary. In fact, the District Court found that the City would operate a unitary system (P.A. 77a), and its previous order assures that such a system will be operated in Greensville County.

Only if plaintiffs are entitled as a constitutional matter to attend schools with a particular racial balance can it be held that plaintiffs' rights have been violated. Such a holding would be contrary to the holding in *Swann* that:

If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

Slip Op. at 19, 20.

CONCLUSION

For the foregoing reasons respondents respectfully pray that a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

VIRGINIA CONSTITUTION

§ 133. *School districts; school trustees.*—The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Each magisterial district shall constitute a separate school district, unless otherwise provided by law, and the magisterial district shall be the basis of representation on the school board of such county or city, unless some other basis is provided by the General Assembly; provided, however, that in cities of one hundred and fifty thousand or over, the school boards of respective cities shall have power, subject to the approval of the local legislative bodies of said cities, to prescribe the number and boundaries of the school districts.

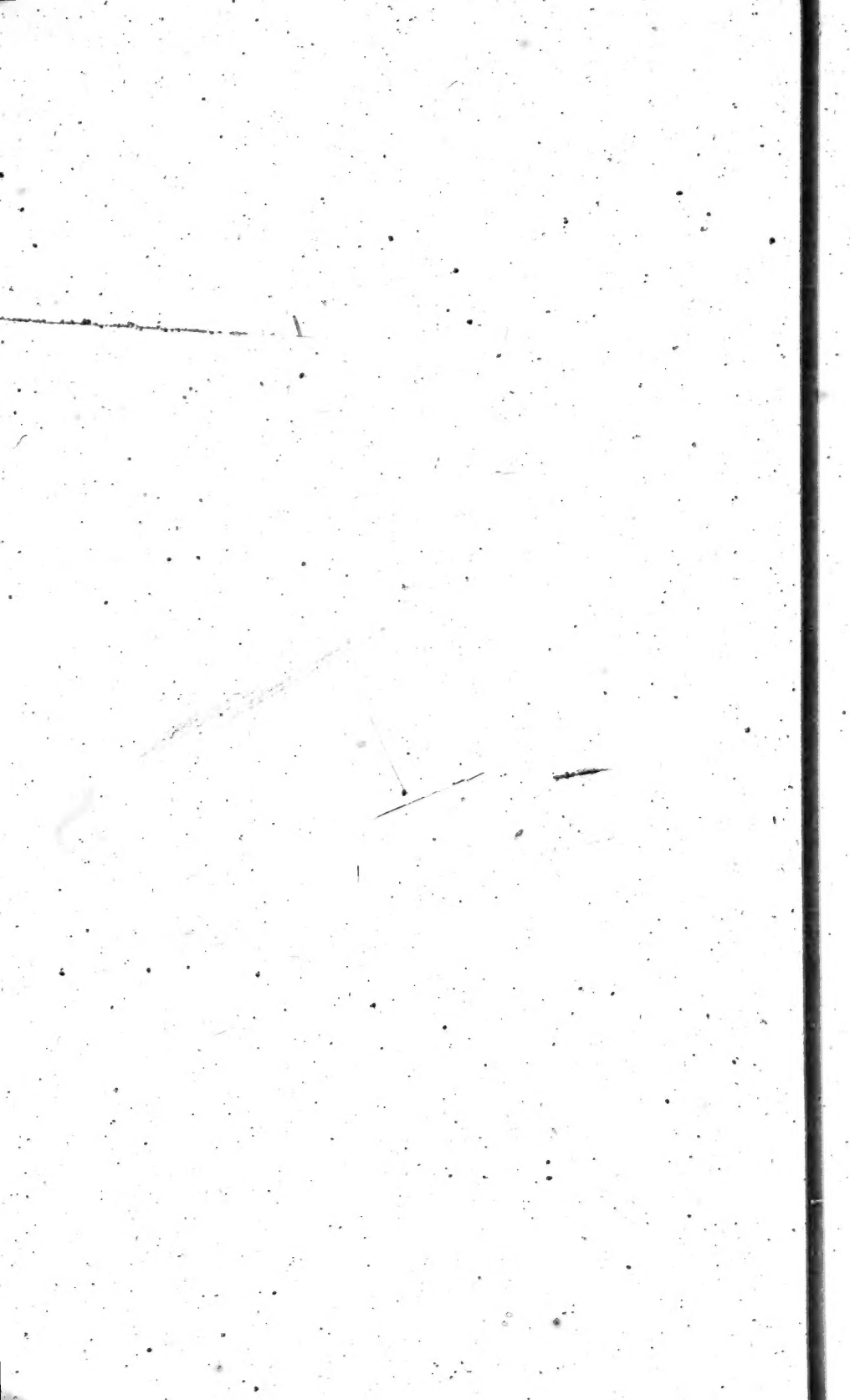
The General Assembly may provide for the consolidation, into one school division, of one or more counties or cities with one or more counties or cities. The supervision of schools in any such school division may be vested in a single school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Upon the formation of any such school board for any such school division, the school boards of the counties or cities in the school division shall cease to exist.

There shall be appointed by the school board or boards of each school division, one division superintendent of schools, who shall be selected from a list of eligibles certified by the State Board of Education and shall hold office for four years. In the event that the local board or boards fail to elect a division superintendent within the time prescribed by law, the State Board of Education shall appoint such division superintendent.

* * *

VA. CODE ANN. (1950)

§ 15.1-982. Result of census; order.—If it shall appear to the satisfaction of the court, or the judge thereof in vacation, from such enumeration that such incorporated community has a population of five thousand or more, such court or judge shall thereupon enter an order declaring that fact to exist and thereafter such incorporated community shall be known as a city and entitled to all the privileges and immunities and subject to all the responsibilities and obligations pertaining to cities of this Commonwealth. . . .



No. 70-188

Supplemental brief in support
of petition filed Aug. 9, 1971.
Vide No. 70-187. SEE 70-187.

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OCTOBER TERM, 1971

No. 70-188

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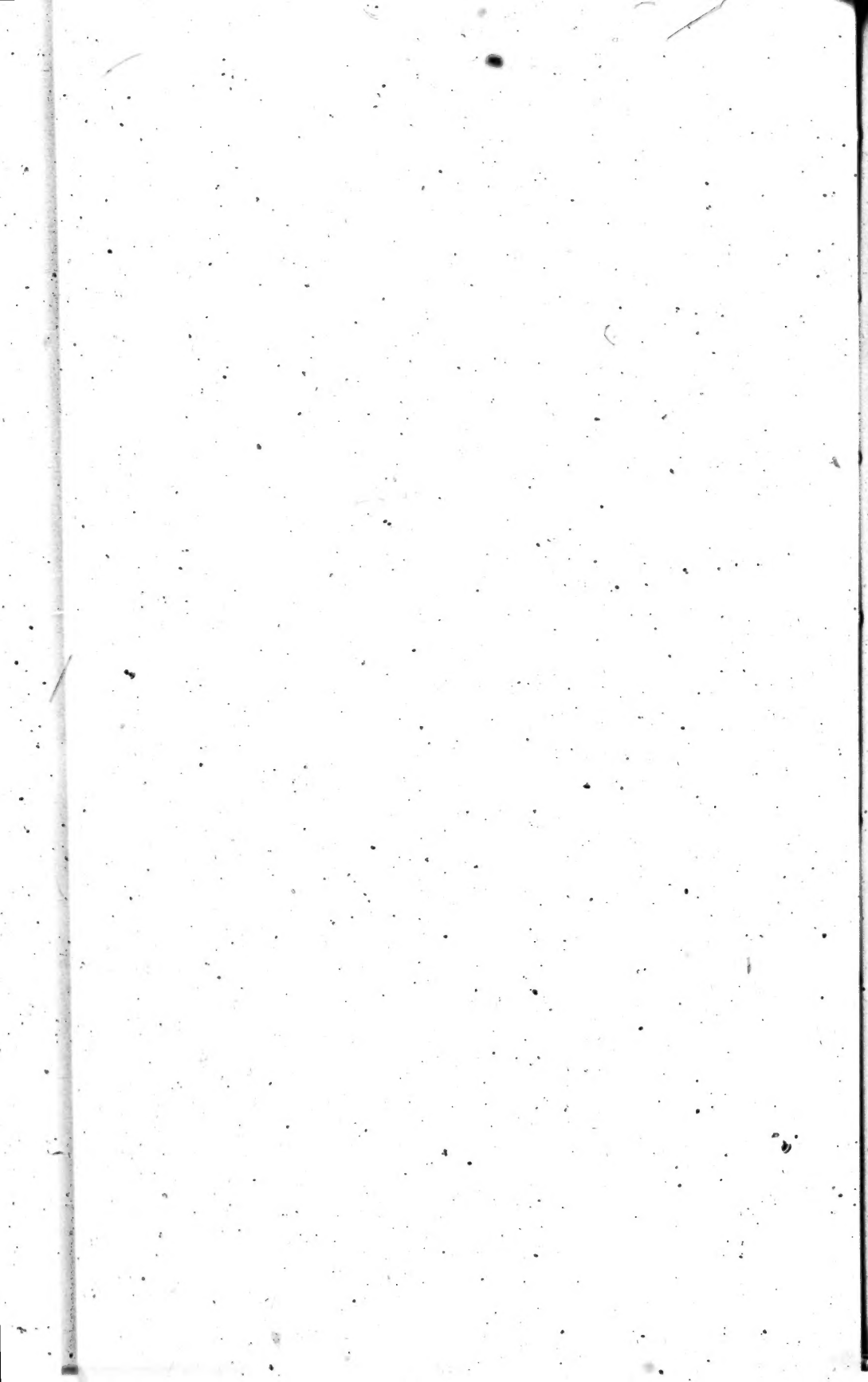
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IN THE
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BRIEF FOR PETITIONERS

Opinions Below

The opinions of the courts below are as follows:

1. District Court's Findings of Fact and Conclusions of Law of August 8, 1969 and Order of August 8, 1969 granting preliminary injunction, unreported (190a-195a).¹
2. District Court's Opinion of March 2, 1970, reported at 309 F. Supp. 671 (293-309a).
3. Court of Appeals' Opinions of March 23, 1971, reported at 442 F.2d 570, 588 (311a-347a).

¹ Citations are to the Single Appendix filed herein.

Earlier proceedings in the same case are reported as *Wright v. County School Bd. of Greenville County*, 252 F. Supp. 378 (E.D. Va. 1966) (15a-28a).

Jurisdiction

The judgment of the Court of Appeals was entered on March 23, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The petition for a writ of certiorari was filed in this Court on May 20, 1971, and was granted on October 12, 1971.

Question Presented

Whether the Court of Appeals erred by holding that new school districts may be operated which divide a unit that is faced with the duty to desegregate a dual system, where the changed boundaries result in less desegregation, and where formerly the absence of such boundaries was instrumental in promoting segregation.

Constitutional and Statutory Provisions Involved

This matter involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following sections of the Virginia Code (statutes related to the operation of school districts and divisions within the Commonwealth of Virginia) are set out in an appendix to this Brief, *infra*: Va. Code Ann. §§22-7, -30, -34, -42, -43, -89, -99, -100.1, -100.2 (Repl. 1969).

Statement

Background of the Litigation

This lawsuit began with the filing of a Complaint on March 15, 1965 seeking the desegregation of the public schools of Greenville County, Virginia (2a-11a), a rural county near the center of which was located the town of Emporia (15a).² As the district court found, "[p]rior to 1965, the county operated segregated schools based on a system of dual attendance areas. *The white schools in Emporia served all white pupils in the county.* The four Negro elementary schools were geographically zoned, and the Negro high school served all Negro pupils in the county" (emphasis supplied) (15a). On January 27, 1966 the court approved, subject to satisfactory amendment so as to provide for faculty desegregation, a freedom-of-choice plan

² Under Virginia law applicable at the time of the events relevant hereto, the county was the basic operational school unit, Va. Code Ann. §22-42 (Repl. 1969). In 1965, when Emporia had the status, under Virginia law, of a "Town," the County School Board of Greenville County operated public schools for children residing therein as well as in the rest of Greenville County. Although the Town might have sought designation by the State Board of Education as a separate school district, either to obtain representation on the county school board, see Va. Code Ann. §22-42 (Repl. 1969) or to operate its own school system, Va. Code Ann. §22-43 (Repl. 1969), there is no indication in this record of any attempt to do so while Emporia was a Town.

which the county had adopted in April, 1965 in order to retain its eligibility for federal funds under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d-1 *et seq.* (16a). *Wright v. County School Bd. of Greenville County*, 252 F. Supp. 378 (E.D. Va. 1966).

On July 31, 1967, the Town of Emporia became a city of the second class³ and a school board for the new city was appointed.⁴ On December 7, 1967, the State Board of Education designated Emporia and Greenville County a single school division (245a).⁵ The schools continued to be operated under the freedom-of-choice plan by the county school board for both city and county children while discussions between officials about ultimate school organization pro-

³ See Va. Code Ann. §§15.1-978 *et seq.* (Repl. 1964). Unlike towns, cities in Virginia are entities politically independent of the counties which surround them, see *City of Richmond v. County Board*, 199 Va. 679, 684, 101 S.E.2d 641, 644 (1958); *Colonial Heights v. Chesterfield County*, 196 Va. 155, 82 S.E.2d 566 (1954), and they may maintain duplicate institutions for the provision of governmental services except for specified shared services, Va. Code Ann. §15.1-1005 (Repl. 1964). Cooperative agreements between political subdivisions are authorized, Va. Code Ann. §15.1-21 (Repl. 1964).

⁴ Va. Code Ann. §22-89 (Repl. 1969).

⁵ Virginia law provides that the State Board is ultimately responsible for the administration of public free education in the Commonwealth, Va. Code Ann. §22-2 (Repl. 1969); it was required (at times pertinent to this case) to divide the State "into appropriate school divisions" of at least one county or city, each school division to be administered by a superintendent of schools meeting qualifications established by the State Board and exercising such powers as were conferred by the State Board, Va. Code Ann. §§22-30, -31, -36 (Repl. 1969). In a school division composed of more than one political subdivision, the Division Superintendent serves the school boards of each and, if separate school systems are being maintained, administers each system (144a, 245a, 267a-269a). The school boards of the independent political subdivisions constituting a single school division must meet jointly to select a division superintendent from the eligible candidates' list approved by the State Board of Education, Va. Code Ann. §§22-32, -34 (Repl. 1969); see also, 98a.

ceeded.⁶ Subsequently, on April 10, 1968, the school boards and governing bodies of the city and county entered into a four-year contract providing that the County would operate public schools for city children in return for payment by the City of a specified percentage of the capital and operating cost (32a-36a).⁷

⁶ Virginia law provided that the city and county school boards might: subject to the approval of the State Board and local governing bodies, establish joint schools, Va. Code Ann. §22-7 (Repl. 1969); operate separate school systems; establish a single school board for the school division and operate as a single system, again subject to the approval of the State Board and local governing bodies, Va. Code Ann. §§22-100.1, -100.2 (Repl. 1969); or by contractual agreement the county might provide educational services for city children, Va. Code Ann. §22-99 (Repl. 1969).

On November 27, 1967, the Greenville County Board of Supervisors had resolved that it would not approve joint operation (30a); so long as this position was maintained, the city school board's remaining options were either an independent school system or contractual agreement.

⁷ Because no settlement had yet been reached, the County Board of Supervisors resolved on March 19, 1968 (31a) to terminate provision to city residents of all but statutorily required services unless a contractual agreement were accepted by the city by April 30. Thus, the Mayor of Emporia and the Chairman of its School Board testified in 1969, the contract was signed only under pressure (233a) and only because the failure of the boards to agree on a price for the schools located in the city prevented Emporia from operating its own school system (119a). However, the city could have filed suit in 1967, as it did in 1969 (237a, 242a) to establish its equity in the schools had it desired to operate an independent system, Va. Code Ann. §§15.1-1003, -1004 (Repl. 1964); *Colonial Heights v. Chesterfield County*, 196 Va. 155, 82 S.E.2d 566 (1954); *School Bd. v. School Bd.*, 200 Va. 587, 106 S.E.2d 655 (1959). Instead, it negotiated for preferred contractual terms (see 230a).

Both the Mayor and School Board chairman said they were satisfied with the education provided city children by the county prior to the June 25, 1969 district court order (163a, 235a), and, in fact, the July 7, 1969 letter from the City Council to the County Supervisors proposing an independent system recites that the city signed the contract because of its judgment about educational benefits of a combined school system:

In 1967-68 when the then Town of Emporia, through its governing body, elected to become a city of the second class, it

June 21, 1968, plaintiffs filed a Motion for Further Relief consistent with this Court's ruling in *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968) (37a). The district court directed the County School Board to demonstrate its compliance with *Green* or to present a plan to bring it into compliance (1a [Docket Entries, p. 2]). August 8, 1968, the board requested that freedom-of-choice be continued for another year while a zoning or pairing plan was developed (294a).⁸ The district court acquiesced because of the short time remaining before the start of the school year and because a new division superintendent had just been hired (50a, 182a; see 98a) but required submission of a new plan by January 20, 1969 (1a; 294a). Again the County School Board responded (38a-45a) by asking that freedom of choice be continued.⁹ In the alternative, the Board proposed: to establish different cur-

was the considered opinion of the Council that the educational interest of Emporia citizens, their children and those of the citizens and children of Greensville County, could best be served by continuing a combined City-County school division, thus giving students from both political subdivisions full benefits of a larger school system (emphasis supplied) (56a).

⁸ The district court's opinion sets forth enrollment statistics for the 1967-68 school year which show that under freedom of choice, no white students had elected to attend any of the five all-black schools, while 96 of 2568 black students had chosen to enroll in two predominantly white facilities (294a). Faculty desegregation was minimal (*ibid.*).

⁹ The board asked to modify the outstanding decree (29a) as follows (42a): (1) Faculty and administrators would be permitted to encourage exercise of choices in favor of desegregation, see *United States v. Hinds County School Bd.*, 417 F.2d 852 (5th Cir. 1969); (2) If substantial desegregation did not occur in this manner, elementary children would be assigned to special classes across racial lines, see, e.g., *United States v. Board of Educ. of Webster County*, 431 F.2d 59 (5th Cir. 1970); (3) Course duplication in the two high schools would be eliminated so as to bring about attendance at both facilities; (4) At least 25% of the faculty at each school would be of the minority race.

ricular programs—academic, vocational-technical, and terminal-degree—at each high school and to assign students according to their curricular choice (43a),¹⁰ and to reassign black elementary students to white elementary schools on the basis of standardized achievement test scores.¹¹

Following a hearing February 25, 1969, the district court disapproved the request to continue freedom of choice and took the board's alternative proposal under advisement (1a) pending submission of enrollment projections under the testing plan based on student scores (51a). On March 18, 1969, petitioners filed their own proposal to desegregate the Greenville County schools by pairing (46a-47a). At the conclusion of an evidentiary hearing on June 23, 1969, the district court announced orally (49a-53a) that it would disapprove the school board's alternative plan because it would "substitute a segregated—one segregated system for another segregated school system and that is all it is" (51a). The court directed implementation of the plan proposed by the plaintiffs:

The Court directs therefore that the proposed plan of desegregation submitted by the plaintiffs is to be put in effect and a mandatory injunction directing the School Board to put that plan in effect commencing September would be entered.

Now, the Court will consider any amendments to it so as not to preclude a better plan, but so there is no further delay and so we don't come up in August and

¹⁰ See *Lemon v. Bossier Parish School Bd.*, 446 F.2d 911, 444 F.2d 1400 (5th Cir. 1971).

¹¹ See *Anthony v. Marshall County Bd. of Educ.*, 419 F.2d 1211 (5th Cir. 1969); *United States v. Sunflower County School Dist.*, 430 F.2d 839 (5th Cir. 1970); *United States v. Tunica County School Dist.*, 421 F.2d 1236 (5th Cir. 1970); *United States v. Board of Educ. of Lincoln County*, 301 F. Supp. 1024 (S.D. Ga. 1969); *Moses v. Washington Parish School Bd.*, Civ. No. 15973 (E.D. La., August 9, 1971).

say, "Well, now, we have got a plan but can't do it for a year," the School Board is directed today, now, to commence their work to do whatever is necessary to put in effect the plan for desegregation submitted by the plaintiff. (53a)

June 25, 1969, a written order disapproving the board's plan and mandatorily enjoining implementation of the pairing plan proposed by plaintiffs was entered (54a-55a).¹²

Emporia Moves to Operate a Separate System

On July 7, 1969—twelve days after entry of the district court order requiring pairing of schools in Greenville County—the City Council of Emporia wrote to the Greenville County Board of Supervisors and School Board (56a-60a) formally announcing the City's intention to operate a school system separate from Greenville County effective August 1, 1969 (57a). The Council proposed that the April 10, 1968 contract be terminated by mutual agreement (58a), that a new contract be drafted to cover shared services other than public schools, including a procedure to determine the equity of the city and county in their school buildings (59a-60a), and that pending such determinations, the title to school buildings located within Emporia be transferred to the City immediately so that its school system could begin operation (60a). As part of its proposal, the Emporia Council offered to accept county students on a tuition basis in its separate school system (*ibid.*).

¹² That order was subsequently modified in accordance with the comments of the district court quoted next above. On July 23, 1969, the County School Board filed a motion to amend the June 25 judgment by substituting a different plan (76a-79a). A hearing was held July 30, 1969 at which yet another version of a pairing plan was proposed by the County School Board and adopted by the district court (162a, 174a, 295a).

The Council's letter clearly indicated that the source of its concern was the desegregation decree, rather than any longstanding dissatisfaction with the county school system:

In 1967-68 when the Town of Emporia, through its governing body, elected to become a city of the second class, it was the considered opinion of the Council that the educational interest of Emporia Citizens, their children and those of the citizens and children of Greensville County, could best be served by continuing a combined City-County school division, thus giving students from both political subdivisions full benefits of a larger school system.

The Council was not totally unaware of a Federal Court suit against Greensville County existing at that time, regarding school pupil assignments, pupil attendance, and etc., but they did not fully anticipate *decision by the court which would seriously jeopardize the scholastic standing and general quality of education affecting City students attending the combined school system.*

• • •
The pending Federal Court action, at the time of Emporia's transition from a town to a city, was finally decided by the court on June 23, 1969. The resulting order **REQUIRES** massive relocation of school classes, excessive bussing of students and mixing of students within grade levels with complete disregard of individual scholastic accomplishment or ability.

An in-depth study and analysis of the directed school arrangement reflects a totally unacceptable situation to the Citizens and City Council of the City of Emporia.

• • •
... In these preliminary meetings, the City expressed a sincere need for an increase in its geographical

boundaries through *extensive annexation in order to provide an adequate tax basis to support an independent school system*. The Council is of the opinion annexation of portions of land beyond the City limits is most desirable in the interest of the people involved and the City. A careful preliminary study, including all facets of school operation and with particular attention to objections raised by County Officials, has been conducted and the facts indicate that it *may be feasible to operate a City School System without immediate annexation*. (emphasis supplied) (56a-58a).

The letter did not request that the County Board propose any alternative desegregation plan to the district court.

July 9, 1969, a special City Council meeting was held, which the Mayor announced was for the purpose of "establishing a City School System" (61a). The minutes reflect that most of the meeting was held in executive session. July 14, 1969, the City Council met again in special session; the minutes (62a-66a) reflect the purpose of the meeting was "to take action on the establishment of a City School System, to try and save a school system for the City of Emporia and Greensville County" (emphasis supplied) (62a). The Mayor is reported in the minutes to have said, "it's ridiculous to move children from one end of the County to the other end, and one school to another, to satisfy the whims of a chosen few." He said, "The City of Emporia and Greensville County are as one, we could work together to save our school system" (emphasis supplied) (*ibid.*).

At the July 14 meeting, the City School Board chairman reported the racial composition of each school under the plan approved by the district court. After the Mayor advised the Council that the County Supervisors had de-

clined to transfer school buildings within Emporia to the city for fear of "placing themselves in contempt of the Federal Court order" (63a), the Council discussed possible termination of the contract by mutual agreement or annexation. The City School Board chairman told the Council that if the City had title to the three school facilities located in Emporia, 500 county students could be accommodated in addition to city residents (64a-65a);¹³ and finally, the Council voted unanimously to direct the City Attorney to take the necessary steps to determine the city's equity in county holdings (including schools) (66a).

The County School Board met two days later and reiterated that while it would appeal the district court's order and also seek to change the terms of the order, it would not transfer facilities to Emporia or assist in the creation of a separate system because

this Board believes that such action is not in the best interest of the children of Greensville County. . . . (67a-69a).

July 17, the Emporia City School Board met to adopt a resolution requesting designation of Emporia as a separate school division (70a-72a). Again, the resolution demonstrates that the source of concern was the desegregation decree.¹⁴ A similar resolution was adopted by the City Council on July 23, 1969 (73a-75a).

¹³ There were 728 white students residing in the county area outside Emporia (304a).

¹⁴ WHEREAS it is the considered opinion of the Board that the requirements under the decree of the Federal District Court for the Eastern District of Virginia in a suit to which the County of Greensville is a party will result in a school system under which the school children of the City of Emporia will receive a grossly inadequate education; and

WHEREAS under the decree aforementioned, there will be substantial overloading of certain school buildings and substan-

July 30, 1969, the City School Board adopted a plan to hold registration for the 1969-70 school year August 4-8, 1969—although the State Board had not made any ruling on the request for separate school division status (80a-81a). The registration notice invited applications from nonresidents on a tuition basis (82a).

At the July 30 meeting the city school board also instructed its acting clerk to investigate the availability of churches and vacant buildings for use should the City be unsuccessful in obtaining title to the school buildings in Emporia (81a).

On August 1, 1969, by leave of the district court (83a), the petitioners herein filed a Supplemental Complaint adding as defendants in the pending action, the City Council of Emporia and the School Board of the City of Emporia (84a-87a). The Supplemental Complaint alleged that establishment of a separately operating school system for the City of Emporia or the withholding by the City of the monies due Greensville County pursuant to the contract would "frustrate the execution of this [District] Court's order and the efforts of the County School Board of Greensville County to implement the above mentioned plan [approved by the district court on July 30, 1969] for the operation of the public school system which heretofore has served children residing in the City of Emporia," and sought to restrain the City Council and School Board from taking any acts which would interfere with execution of the outstanding district court order (86a). On August 5,

tial underuse of other school buildings at an excessive cost to both the County and the City, the cost of school transportation will be exaggerated out of all need in that pupils will be assigned to schools on a basis other than that of proximity, the City's contribution toward education will be substantially increased without any additional benefit in education to its children, (71a)

the Emporia School Board made "assignments" of grades 1-7 to the Emporia Elementary School and grades 8-12 to the Emporia (Greensville County) High School, contingent upon those buildings being made available to the City School Board for the 1969-70 school year (89a).

The matter came before the district court for hearing upon petitioners' prayer for a preliminary injunction on August 8, 1969 (90a-189a). Various exhibits were introduced, including the minutes of the school board's and governing bodies' meetings, and testimony was taken.

The Division Superintendent of Schools, who would be responsible for administering a separate district unless the State Board created a new school division, testified that he had no plans to implement a separate district and had met with the city school board only once, August 5, 1969 (92a, 98a-99a). He did have statistics showing that the total student population in the combined system was, he said, approximately 63% black, while the city students were approximately 50% black and county students about 70% black (109a).

• The Mayor of Emporia stated that the City Council had not discussed the establishment of a separate city school system at any of its meetings prior to July, 1969 (118a) nor had the Council or the City School Board attempted to intervene in this litigation to present their views (128a). Despite what he referred to as eight years of antagonism between Emporia and Greensville County (159a), he said the City had been satisfied with the County's school operation prior to the district court's decree (163a). The June 25 order precipitated the desire to operate a city system because of white flight which was anticipated in response to the decree (121a-122a, 167a). He said he had doubts about the willingness and ability of the County

to make the unitary system work effectively (135a) and "that in order to have a well-functioning working unitary system in the heart of southside Virginia that it will take the leadership of the city government and of the leading city members . . ." (123a). It was the City's desire, he said, to afford city students an education superior to that which they would receive in the county schools operated pursuant to the desegregation decree (124a) but he was also aware that the racial composition of the city school system would be about 50-50 (126a) and as well that the buildings which the city school board hoped to acquire from the county were the formerly white schools, still predominantly white in 1968-69 (116a).¹⁵

Edward Lankford, Chairman of the Emporia School Board, testified that his board met officially only to select a division superintendent with the Greenville County Board, but otherwise had "nothing to do with the county system" even while the contract was in force (140a, 145a). He said the City Board had been dissatisfied with the contract from its inception although they had not acted (147a) until the desegregation decree requiring attendance at several different schools during the twelve grades of a child's education was entered (148a). He agreed with the Mayor that successful operation of a unitary system required leadership which in his opinion the city could provide but the county could not (153a), and he said there was a "definite possibility" that city residents would be willing to pay higher taxes to support their own school system (154a).

¹⁵ The 1968-69 enrollment statistics can be found in the district court's opinion (298a); 98 of 2510 black students attended two white schools while again, no white students enrolled in five all-black schools. See n.8 *supra*.

Mr. Lankford was aware that creation of an independent city system would increase the percentage of black students in the remaining county system and reduce the percentage of black students to which city students would be exposed' (143a). He discussed the adverse effects of separate systems:

The Court: And it is going to have a deleterious effect on the students of Greenville County because you are going to take some of their superintendents and he will be responsible to two Boards and take buildings that they have been using, isn't that correct?

The Witness: That is correct

The Court: As a matter of fact it is going to change the racial composition of the student population of Greenville County, which let's call it what it is, that is one of the problems in segregating schools, isn't it?

The Witness: Yes, sir.

By Mr. Warriner:

Q. Now, I want to know, sir, what adverse effect, what adverse effect are you talking about when you say that there would be an adverse effect on the county? A. I don't know that I could answer that. The question to which I answered that this would be an adverse effect I would like to have repeated if possible.

Q. It can be repeated. The Judge asked you whether it would have an adverse effect or a detrimental effect and you agreed with him. I want to know what are the adverse effects? A. Well, as you have pointed

out if the county has a surplus of school teachers and these teachers are willing to terminate their contract to come to the city then there would be no adverse effect insofar as teachers are concerned.

If the county has a surplus of buildings and the buildings are no longer needed by the county and the city is willing to assume those buildings, that is no adverse effect.

Q. Leaving out the ifs, will the county have a surplus of teachers and will the county have a surplus of buildings? A. In my opinion, yes, sir.

Q. All right, sir.

Then you would have no adverse effect on the county? A. No, sir.

Q. I want you to, if there is anything that is unneighborly to the County of Greenville, I want you to state it. A. *The only adverse effect as asked by His Honor, the Judge, would be the racial ratio remaining in the county.* (149a, 151a-152a) (emphasis supplied)

At the conclusion of the hearing, the district judge announced that he would grant the injunction. The court noted that although a year passed between the filing of the motion for further relief and the entry of a decree, the City Council and School Board made no attempts to communicate their wishes to the County officials or to the Division Superintendent (181a-182a). Following its June 25 order, the court noted, the Mayor expressed his disapproval to the City Council and after being informed of the expected Negro enrollments at each school under the court-ordered plan, it was determined to establish an independent city system (183a). However, the court found that creation of a new entity would not only interfere with

and disrupt execution of the plan already ordered but would be unconstitutional (183a):

Under the New Kent decision this School Board had an obligation and a duty to take steps to see to it that a unitary system was entered into. All they have done up until now, and the Court is satisfied that while their motives may be pure, and it may be that they sincerely feel they can give a better education to the children of Emporia, they also have considered the racial balance which would be roughly 50-50 which would reduce the number of white students to, under the present plan, would attend the schools as presently being operated.

The Court finds that under *Brown v. Board of Education* 349 U.S. 294 that these defendants, all of them, have an obligation that they are going to abide by.

In short, gentlemen, I might as well say what I think it is. It is a plan to thwart the integration of schools. This Court is not going to sit idly by and permit it. I am going to look at any further action very, very carefully. I don't mind telling you that I would be much more impressed with the motives of these defendants, had I found out they had been attempting to meet with the School Board of Greenville County to discuss the formation of a plan for the past year. I am not impressed when it doesn't happen until they have reported to them the percentage of Negroes that will be in each school.

... The Court will be delighted to entertain motions for amendment of the plan at any time (184a-185a).

The same day the district court entered formal Findings of Fact and Conclusions of Law (190a-194a) as well as a

temporary injunction restraining "any action which would interfere in any manner whatsoever with the implementation of the Court's order heretofore entered in reference to the operation of public schools for the student population of Greenville County and the City of Emporia" (195a).

The District Court's Decision

Respondents declined to appeal from the decision granting a preliminary injunction, seeking instead to make a more extensive record (187a).

Pursuant to the injunction, schools in Emporia and Greenville County opened for 1969-70 in accordance with the district court's June 30, 1969 order. The State Board of Education at its August 19-20, 1969 meeting, tabled Emporia's request for designation as a separate school division "... in light of matters pending in the federal court" (198a). The minutes of the State Board meeting note that "[t]he Greenville County school board has passed and submitted a resolution opposing the dissolution of the present school division consisting of the county and the city. . . ." (*ibid.*).

On December 3, 1969, the Emporia School Board adopted a proposed 1970-71 budget prepared at its request by the former Superintendent of Schools of Richmond, Virginia (200a-201a). The budget is extensive and expensive, proposing numerous supplementary services (202a-223a). On December 10, 1969, the school board was informed that the City Council had accepted the budget (224a), and it proposed a desegregation plan for submission to the district court assigning grades 1-6 to the former Emporia Elementary School and grades 7-12 to the former Greenville County High School (225a). The

hearing on permanent relief was held December 18, 1969 (226a-292a).

Much of the City's evidence was repetitive of the earlier hearing. Mr. Lankford testified again that the city was dissatisfied with the contractual arrangements because it had no control over such matters as hiring, salaries or curriculum (242a). He said he had been satisfied with the education afforded city students by the county prior to the pairing order (235a) but that order required additional transportation expenditures and he feared the County School Board would be unwilling to raise the additional revenues (236a).

Emporia's Mayor also repeated his opinions that the county would not adequately support a unitary school system but the city would (289a-290a) and that without the creation of a separate system the city would lose white students to private schools during the 1970-71 school year (291a).

However, armed with the detailed budget developed and adopted *after* the district court's temporary injunction had been entered,^o both witnesses stressed that the city desired to operate an educational system superior to that which the county would provide. The City also presented the testimony of a Professor of Education, Dr. Neil Tracey, in support of this claim.

Dr. Tracey testified that it was his "understanding" that he was not serving the City in "any attempt to resegregate or to avoid desegregation" (269a). He compared the educational programs of Greenville County with those proposed by the Emporia School Board's 1970-71 budget without reference to the racial composition of the two systems because, he said,

... my basic contention is and has been, that elimination of the effects of segregation must be an educational solution to the problem and that no particular pattern of mixing has in and of itself, has any desirable effect. . . . *The problem is to permit the Negro child to integrate into society* both in terms of general social problems and in terms of economic patterns. . . . (emphasis supplied) (270a).¹

Dr. Tracey preferred the Emporia budget because, he said, the county educational program did not include the kind of supplemental, supportive projects he thought were required to make integration work. He did not feel the county's school budget was high enough, for example (274a). However, he did recognize problems which might be created by separation: Emporia could draw the better county teachers off (281a); the range of exposure afforded the isolated, rural children in the county would be narrowed (284). In fact, Dr. Tracey concluded that if the county were to support what he considered an adequate educational program, he would favor continuation of the consolidated unit (285a).

In a careful opinion issued March 2, 1970 (293a-309a), the district court weighed the competing claims. The court noted that petitioners' supplemental complaint sought relief in the nature of an injunction against third parties to protect the court's decree, and that after issuance of the temporary injunction the City had answered the Supplemental Complaint (196a-197a) "denying the allegation that the plan for separation would frustrate the efforts of the Greenville County School Board to implement the plan embraced by the Court's order" (293a, 299a). Since, obviously, the City's plan to operate a separate school system for city residents would prevent execution of the plan

which had been ordered; the court pointed out that the issue before it was not solely the plaintiffs' right to relief protecting the earlier decree:

... at the December 18th hearing [, i]ssues explored went beyond the question whether the city's initiation of its own system would necessarily clash with the administration of the existing pairing plan; indeed, there seems to be no real dispute that this is so. The parties went on to litigate the merits of the city's plan, developing the facts in detail with the help of an expert educator. Counsel for the city stated that "at the conclusion of the evidence today, we will ask Your Honor to approve the assignment plan for the 1970-71 school year and to dissolve the injunction now, against the city, effective at the end of this school year," Tr., Dec. 18, at 11 (298a-299a).

The district court concluded that the respondents had standing to seek amendment of the July 30 decree (299a-303a) and proceeded to the merits of the assignment plan proposed by the City.

The court described the grade assignments, noting that the City expected enrollments 10% above the number of city residents enrolled in the combined system during 1969-70 because "some pupils now attending other schools would return to a city-operated school system" (206a, 297a).¹⁶ The district judge found that the budget for the city system "clearly contemplates a superior quality educational program" requiring "higher tax payments by city residents" (297a); however, the court also remarked upon the difficulties which would arise with the establishment of two separate systems serving Greenville County and

¹⁶ The City did not now propose to accept county students on a tuition basis without approval of the district court (225a).

Emporia: a "substantial shift in the racial balance," a city high school of less than optimum size, isolation of rural county students, from exposure to urban society, disruption of teaching staff, and withdrawal of city leadership from the county's educational program.¹⁷ The district

¹⁷ The establishment of separate systems would plainly cause a substantial shift in the racial balance. The two schools in the city, formerly all-white schools, would have about a 50-50 racial makeup, while the formerly all-Negro schools located in the county which, under the city's plan, would constitute the county system, would overall have about three Negro students to each white. As mentioned before, the city anticipates as well that a number of students would return to city system from private schools. These may be assumed to be white, and such returnees would accentuate the shift in proportions.

The impact of separation in the county would likewise be substantial. At each level the proportion of white pupils falls by about four to seven percent; at the high school level the drop is much sharper still.

In Dr. Tracey's opinion the city's projected budget, including higher salaries for teachers, a lower pupil-teacher ratio, kindergarten, ungraded primary schooling, added health services, and vocational education, will provide a substantially superior school system. He stated that the smaller city system would not allow a high school of optimum size, however. Moreover, the division of the existing system would cut off county pupils from exposure to a somewhat more urban society. In his opinion as an educator, given community support for the programs he envisioned, it would be more desirable to apply them throughout the existing system than in the city alone.

While the city has represented to the Court that in the operation of any separate school system they would not seek to hire members of the teaching staff now teaching in the county schools, the Court does find as a fact that many of the system's school teachers live within the geographical boundaries of the city of Emporia. Any separate school system would undoubtedly have some effect on the teaching staffs of the present system.

The inevitable consequence of the withdrawal of the city from the existing system would be a substantial increase in the pro-

court concluded that it should resolve the matter by approving the plan most likely to bring about the successful dismantling of the dual school system in Greenville County and Emporia:

... This is not to say that the division of existing school administrative areas, while under desegregation decree, is impermissible. But this Court must withhold approval "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system," *Monroe v. Board of Commissioners, supra*, 391 U.S. 459, 88 S.Ct. 1705. As a court of equity charged with the duty of continuing jurisdiction to the end that there is achieved a successful dismantling of a legally imposed dual system, this Court cannot approve the proposed change. (308a).¹⁸

portion of whites in the schools attended by city residents, and a concomitant decrease in the county schools. The county officials, according to testimony which they have permitted to stand un rebutted, do not embrace the court-ordered unitary plan with enthusiasm. If secession occurs now, some 1,888 Negro county residents must look to this system alone for their education, while it may be anticipated that the proportion of whites in county schools may drop off as those who can register in private academies. This Court is most concerned about the possible adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs (304a-306a, 308a).

¹⁸ ... Assuming *arguendo*, however, that the conclusions aforementioned are valid, then it would appear that the Court ought to be extremely cautious before permitting any steps to be taken which would make the successful operation of the unitary plan even more unlikely.

The Court does find as a fact that the desire of the city leaders, coupled with their obvious leadership ability, is and will be an important facet in the successful operation of *any* court-ordered plan.

• • •

While the district court discussed the possible motives of the respondents, it held that the question of motive was not controlling.¹⁹

If Emporia desires to operate a quality school system for city students, it may still be able to do so if it presents a plan not *having such an impact upon the rest of the area now under order*. The contractual arrangement is ended, or soon will be. Emporia may be able to arrive at a system of joint schools, within Virginia law, giving the city more control over the education its pupils receive. Perhaps, too, a separate system might be devised which does not so *prejudice the prospects for unitary schools for county as well as city residents*. This Court is not without the power to modify the outstanding decree, for good cause shown, if its prospective application seems inequitable (emphasis supplied) (306a, 309a).

¹⁹ The motives of the city officials are, of course, mixed.

Dr. Tracey testified that his studies concerning a possible separate system were conducted on the understanding that it was not the intent of the city people to "resegregate" or avoid integration. The Court finds that, in a sense, race was a factor in the city's decision to secede. . . . Mr. Lankford stated as well that city officials wanted a system which would attract residents of Emporia and "hold the people in public school education, rather than drive them into a private school" Tr. Dec. 18, at 28.

This Court's conclusion is buttressed by that of the district court in *Burleson v. County Board of Election Commissioners*, 308 F. Supp. 352 (E.D. Ark., Jan. 22, 1970). There, a section of a school district geographically separate from the main portion of the district and populated principally by whites was enjoined from seceding while desegregation was in progress. The Court so ruled not principally because the section's withdrawal was unconstitutionally motivated, although the Court did find that the possibility of a lower Negro population in the schools was "a powerful selling point," *Burleson v. County Board of Election Commissioners*, *supra*, 308 F. Supp. 357. Rather, it held that separation was barred where the *impact on the remaining students' rights to attend fully integrated schools* would be substantial, both due to the loss of financial support and the loss of a substantial proportion of white students. *This is such a case* (emphasis supplied) (305a-309a).

The district court's order of March 2 (310a) continued in effect its injunction against interference with the prior order and denied the City's motion to modify the decree.

The Court of Appeals' Ruling

The majority opinion for the Court of Appeals, reversing the judgment of the district court (311a-319a) proceeded from different premises. In the first part of the opinion (311a-313a), the Court announces a general rule for determining whether division of a school district under court order to desegregate into two or more new entities is constitutionally permissible. The Court of Appeals refers to this Court's opinion striking down a racially gerrymandered legislative district in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) and extracts the principle that the enactment there was voided because of its discriminatory legislative purpose, which this Court inferred from the difference in racial composition between the old and the new district. This principle, says the majority, underlies school desegregation decisions voiding an all-black Arkansas school district created in 1949, *Haney v. County Bd. of Educ. of Sevier County*, 410 F.2d 920 (8th Cir. 1969) and prohibiting establishment of a predominantly white "splinter" school district in 1970, *Burleson v. County Bd. of Election Comm'rs of Jefferson County*, 308 F. Supp. 352 (E.D. Ark.), *aff'd per curiam* 432 F.2d 1356 (8th Cir. 1970).

In general, therefore, the Court holds that the permissibility of creating new districts from old ones depends upon whether the "primary purpose . . . is to retain as much of separation of the races as is possible" (313a). Where the result justifies an inference of purpose, that is the end of the matter. Where it does not, the courts are to look to other evidence in forming their judgment of the "primary purpose" for establishing new districts.

The Court of Appeals applies these principles to Emporia in the second part of its opinion. It holds (without regard to the district court's finding of a "substantial shift in racial balance" [emphasis supplied] [304a]) that since "the separation of the Emporia students would create a shift of the racial balance in the remaining county unit of 6 per cent" (316a), no inference of primary discriminatory purpose can be drawn.

The majority notes other evidence that the primary motive was not racial: the district court's findings that Emporia's motives were mixed (racial and non-racial), Dr. Tracey's "understanding," and Emporia's "uncontradicted" testimony (which the appellate court fails to note was rejected by the district court as unsubstantiated opinion) that the County would not raise sufficient revenues to properly operate the system.

Noting the friction between city and county caused by Virginia's "unusual" political structure, the majority holds that federal courts ought not interfere with state or local determinations of what structures may best be adopted to fund public education in the absence of "primary motive" to discriminate (318a); thus, the Court of Appeals intimates no review of the alternatives available to Emporia in deciding that creation of a separate city district is constitutional and was improperly enjoined.

Judge Winter dissented from the majority (336a-346a). His opinion views the case (and its companions) as being controlled by the principles enunciated in *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968) (326a-338a) placing a "heavy burden" upon state authorities who seek to implement a desegregation plan "less effective" than another before the court. Specifically, Judge Winter found ample support in the record for characterizing the separate-district plan as less effective than the prior district

court order: the delay which would have been occasioned by the adoption of new plans in August, 1969; the substantial change of racial proportions ("the creation of a substantially whiter haven in the midst of a small and heavily black area"); and the effect on county black students of the excision from their school system of a significant part of the white population with whom they would have attended classes.

Judge Winter would find that the City had failed to meet its heavy burden to justify this less effective plan since its evidence at best showed *both* educational advantages and disadvantages flowing from the new scheme and revealed *both* racial and nonracial motives behind its adoption (341a). Judge Winter would reject the "primary motive" test and affirm because of the adverse impact occasioned by creation of new districts (346a).

Judge Sobeloff did not participate in the Emporia case because of illness, but in his dissent from a companion case, joined by Judge Winter, he rejected the "primary motive" test.

Judge Sobeloff scored the direction to district courts to weigh the motives of state officials, noting that

resistant white enclaves will quickly learn how to structure a proper record—shrill with protestations of good intent, all consideration of racial factors muted beyond the range of the court's ears. [footnote omitted] (322a).

He suggested that these cases, like other equal protection suits in which state action has a racially discernible effect, were best considered by requiring the State to justify the racially disparate treatment as being required by a compelling state interest (322a-327a). Finally, Judge Sobeloff predicted the unworkability of the "primary motive" test:

If, as the majority directs, federal courts in this circuit are to speculate about the interplay and the relative influence of divers motives in the molding of separate school districts out of an existing district, they will be trapped in a quagmire of litigation. The doctrine formulated by the court is ill-conceived, and surely will impede and frustrate prospects for successful desegregation. Whites in counties heavily populated by blacks will be encouraged to set up, under one guise or another, independent school districts in areas that are or can be made predominantly white.

It is simply no answer to a charge of racial discrimination to say that it is designed to achieve "quality education." Where the effect of a new school district is to create a sanctuary for white students, for which no compelling and overriding justification can be offered, the courts should perform their constitutional duty and enjoin the plan, notwithstanding professed benign objectives (335a-336a).

Summary of Argument

I

The district court had before it two alternatives to desegregate a dual school system which had formerly served students of both Greenville County and the City of Emporia: one involving pairing of all the schools, and another involving separation into a county district and a city district of differing racial compositions, with the schools paired within each system. The lower court concluded the racial shift was "substantial" and that splitting the unit would have other adverse impact upon the county system, and ordered operation as a single unit. This was a proper remedial choice within the equitable discretion of the dis-

trict court which should not have been overturned by the Court of Appeals.

II

The Court of Appeals presumed that State power to create new school districts was plenary, even where there was some interference with federal court desegregation decrees, unless the "primary motivation" was the preservation of segregation. That is the wrong test; it follows neither from this Court's school desegregation rulings nor from other decisions interpreting the equal protection clause of the Fourteenth Amendment, and it is incapable of rational application in the district courts.

III

Even if the determination of motive is a proper inquiry, the Court of Appeals should have remanded the case to the district court, which had not been concerned with the issue at the trial. The Court of Appeals' own determination of the "primary motivation" behind establishment of a separate city school system cannot be supported by a full examination of the record.

ARGUMENT

I.

The District Court Properly Ignored Newly Drawn Political Boundaries in Framing a Remedial Decree to Disestablish School Segregation Which Had Been Maintained Without Regard to the Same Political Boundaries.

If this were a case involving but one school district, which operated seven schools, and the district court had rejected a student assignment plan under which the two formerly white schools would be 50% white, and the five formerly black schools would be 70% black, it would not be before this Court. Compare *Brunson v. Board of Trustees*, 429 F.2d 820 (4th Cir. 1970). Here two school districts are involved—the Greenville County district and the Emporia City school district (which has existed only since 1967). From 1967 until 1969 that city school district remained a part of the county system for student assignment purposes, and under the free choice plan white students throughout the county traversed Emporia's boundaries daily to attend the white schools located in the city. We submit that the district court correctly required that city and county students continue to traverse those boundary lines in order to attend classes in a fully integrated school system.²⁰

²⁰ It is interesting to note that Virginia historically sent black students across city or county lines in order to preserve segregation. See *Buckner v. County School Bd. of Greene County*, 332 F.2d 452 (4th Cir. 1964); *School Bd. of Warren County v. Kilby*, 259 F.2d 497 (4th Cir. 1958); *Goins v. County School Bd. of Grayson County*, 186 F. Supp. 753 (W.D. Va. 1960), stay denied, 282 F.2d 343 (4th Cir. 1960); *Crisp v. County School Bd. of Pulaski County*, 5 Race Rel. L. Rep. 721 (W.D. Va. 1960); *Walker v. County School Bd. of Floyd County*, 5 Race Rel. L. Rep. 714 (W.D. Va. 1960); *Corbin v. County School Bd. of Pulaski County*, 177 F.2d 924 (4th Cir. 1949).

Greensville County maintained rigid school segregation for over a decade after this Court's rulings in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), 349 U.S. 294 (1955). From 1965 until 1969 the desegregation of its schools was token, under a freedom of choice plan. After *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968) the county was ordered to develop a plan to effectively desegregate its schools, but instead it postponed the disestablishment of the dual school system for yet another year by repeatedly requesting delays and by proposing various stratagems to preserve segregation. Finally, in the summer of 1969 the district court ordered complete desegregation by pairing.

Only then, and without even so much as notice to the district court, did Emporia officials seek to separate a city school system from the rest of the county. Approximately one month before the scheduled opening of classes, the district court heard city officials who had no buildings, no specific plans for school operation, and no teachers under contract, insist that Emporia students should not attend classes pursuant to the court's order. The district court enjoined interference with the order.

Emporia renewed its efforts toward creation of a city system the next school year; the district court concluded that the attendance plan envisioned by the city would create a substantial racial disproportion between schools in the city and the county and would otherwise impede the desegregation process. The court refused to modify its earlier decree.

The district court's treatment of city and county as a combined school unit for purposes of its order was a conscientious exercise of its equitable discretion in framing a remedy for unconstitutional school segregation, of the sort this Court approved in *Swann v. Charlotte-Mecklen-*

burg Bd. of Educ., 402 U.S. 1 (1971). While that case had not been decided at the time, *Green v. County School Bd. of New Kent County*, *supra*, mandated federal district courts to assess proposed school desegregation plans by their efficacy, and to select that plan which offers to bring about the greatest amount of desegregation unless there were very compelling reasons for preferring another:

Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith; and at the least it places a *heavy burden* upon the board to explain its preference for an apparently less effective method.

391 U.S. at 439 (emphasis supplied).

Here the district judge acted in accordance with the principles of *Green* by rejecting the city's scheme to place a substantially greater percentage of white students in the former white schools than in the former black schools. As this Court said, 391 U.S. at 435:

The *pattern* of separate "white" and "Negro" schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. (emphasis supplied in part)

And cf. *Swann*, *supra*, 402 U.S. at 26: "[T]o assure a school authority's compliance with its constitutional duty warrants a presumption against schools *that are substantially disproportionate in their racial composition*" (emphasis supplied).²¹

²¹ The defect of the city school board's plan was not that it failed to achieve exact racial balance, *Swann*, *supra*, 402 U.S. at 24, but

This Court has emphasized the breadth of the remedial equitable discretion accorded district courts in school desegregation cases. *E.g.*, *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra*. *Swann* rejected a limitation of "reasonableness" placed upon lower court judges' discretion by the Fourth Circuit. Here the limit seems to turn upon the reviewing tribunal's judgment of substantiality. In both instances the appellate court improperly restricted the ability of the district courts to supervise the desegregation process, see *Raney v. Board of Educ. of Gould*, 391 U.S. 443, 449 (1968).

In cases involving the enforcement of constitutional rights, federal courts are not bound to follow state laws (and hence state law created boundary lines) in effectuating adequate remedies. *E.g.*, *Haney v. County Bd. of Educ. of Sevier County*, 429 F.2d 364, 368 (8th Cir. 1970); *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964); compare *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964) with *Griffin v. Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S.E.2d 227 (1962).

The discretion of the district courts in enforcing the constitutional rights of Negro schoolchildren must extend to crossing state political boundary lines, especially where, as here, the lines are of recent origin and were readily bridged to maintain segregation. The Fifth and Eighth Circuits have sustained such power.

that in this small system consisting of seven school buildings clustered in or near Emporia (see 132a-133a), the traditional racial identities of the schools would be maintained by the pattern of student assignment; the racial identity of no school is eliminated.

In *Lee v. Macon County Bd. of Educ.*, No. 30154 (5th Cir., June 29, 1971) (slip op. at pp. 11-12) (S.A. 11a-12a):²²

School district lines within a state are matters of political convenience. It is unnecessary to decide whether long-established and racially untainted boundaries may be disregarded in dismantling school segregation. New boundaries cannot be drawn where they would result in less desegregation when formerly the lack of a boundary was instrumental in promoting segregation. Cf. *Henry v. Clarksdale Municipal Separate School District*, 5 Cir. 1969, 409 F.2d 683, 688, n. 10.

Oxford in the past sent its black students to County Training. It cannot by drawing new boundaries disassociate itself from that school or the county system. The Oxford schools, under the court-adopted plan, supported by the city, would serve an area beyond the city limit of Oxford. Thus, the schools of Oxford would continue to be an integral part of the county school system. The students and schools of Oxford, therefore, must be considered for the purpose of this case as a part of the Calhoun County School system. (emphasis in original)

Another panel of the Fifth Circuit in *Stout v. Jefferson County Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971) (S.A. 23a-24a), involving a brand new district, quoted this Court's decision in *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971), and held:

²² The decision has not yet been reported but it was reprinted as an appendix to petitioners' Supplemental Brief in Support of Petition for Writ of Certiorari, and citations in the form "S.A. —" are to that document.

" . . . [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."

Likewise, where the formulation of splinter school districts, albeit validity created under state law, have the effect of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of *Swann v. Charlotte-Mecklenburg*, *supra*, recognize their creation. [footnotes omitted]

And in *Burleson v. County Bd. of Election Comm'rs of Jefferson County*, 308 F. Supp. 352, 357 (E.D. Ark.), *aff'd per curiam* 432 F.2d 1356 (8th Cir. 1970), the court held:

The Area residents do not want to move out of the District; they want to move the District and its problems away from themselves. The Court does not think that they can be permitted to avoid the supposed benefits or escape the supposed burdens of the Dollarway litigation so easily, or that in the existing circumstances a majority of the residents of the Area can deprive other residents of their present right to attend fully integrated schools at Dollarway.

No resident of the Area is required to remain there. No resident of the Area is required to send his children to the District's schools. But at this time the residents of the Area as a class *cannot be permitted to use the State's laws and procedures to take the Area out of the District.* (emphasis supplied)

The unsoundness of the Fourth Circuit's approach is demonstrated by comparing this case to *Burleson, supra*. There, formation of a separate system would have increased the remaining school system's black population only 2%, 308 F. Supp. at 356, but the district court held this "will substantially increase the racial imbalance in the District's student bodies" (*ibid.*) and the Eighth Circuit affirmed "on the basis of the district court's opinion," 432 F.2d 1356. Here the district court found a 6% increase to be a "substantial shift" but the Fourth Circuit said it was of no significance.

Obviously the district courts, closest to the litigation, are in the best position to determine whether school populations are, in the context of specific school systems, substantially disproportionate, or whether the integrity of their desegregation decrees is jeopardized. The appellate courts should defer to the exercise of the district courts' discretion where the lower courts have sought to further the desegregation process.

That is the approach of the Fifth Circuit. See *Lee v. Macon County Bd. of Educ., supra*, slip op. at p. 11 (S.A. 11a):

For purposes of relief, the district court treated the Calhoun County and Oxford City systems as one. We hold that the district court's approach was fully within its judicial discretion and was the proper way to handle the problem raised by Oxford's reinstitution of a separate school system.

It is the approach which should have been adopted below.

II.

The "Primary Motive" Standard Announced by the Court Below Is Ill Conceived and Ill Suited to School Desegregation Cases.

The opinion of the majority below announces a new rule for school desegregation cases, one virtually without precedent in our jurisprudence and lacking either analytical or pragmatic support. The rule adopted by the court below provides, in the context of the federal courts' responsibility for the effective enforcement of the Fourteenth Amendment, that the constitutionality of changes in school district organization and attendance patterns shall depend upon examination of the motives of those supporting the changes. If a district court concludes the primary motive was to preserve as much segregation as possible, it may enjoin formation of a new unit; if, as in this case, the lower court finds both racial and non-racial motivations, it must permit the secession in spite of any disadvantageous effects upon desegregation of the schools.

The cases cited by the majority of the Court of Appeals fail to support its thesis that the existence of racial discrimination is to be determined by inquiring into the desires and purposes of those whose acts disadvantage racial minorities.

Gomillion v. Lightfoot, 364 U.S. 339²³ (1960), principally cited by the majority below, came before this Court after a dismissal on the papers in the district court. There were no allegations by the plaintiffs of purposefulness;²³ hence,

²³ The allegations of the Complaint were:

Prior to Act 140 the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure as indicated in the diagram appended to this opinion. The essential inevitable effect of this redefinition of

in ruling that dismissal was improper and that the allegations were sufficient to state a justiciable cause of action, this Court had no occasion even to consider the relevance of legislative intent. Certainly Mr. Justice Frankfurter's language does not intimate what the majority below elicits from *Gomillion*:

It is difficult to appreciate what stands in the way of adjudging a statute *having this inevitable effect* invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, however speciously defined, obviously discriminate against colored citizens. 364 U.S. at 342. (emphasis supplied)

Haney v. County Board of Educ. of Sevier County, 410 F.2d 920, 924 (8th Cir. 1969), also cited by the majority below, specifically eschewed inquiry into the intent or motive of the legislators:

“Simply to say there was no intentional gerrymandering of district lines for racial reasons is not enough. As Mr. Justice Harlan once observed, “[T]he object or purpose [24] of legislation is to be determined by its natural and reasonable effect, whatever may have been

Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, inter alia, the right to vote in municipal elections. 364 U.S. at 341.

²⁴ Even if the Fourth Circuit meant to resurrect the old and confusing notion of a distinction between legislative “motive” or “intent” and “purpose,” viewing *Haney* as resting upon a finding of legislative “purpose,” that hardly serves to sustain the exploration of personal motivations undertaken by the Court of Appeals. See J. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970).

the motives upon which legislators acted." *New York v. Roberts*, 171 U.S. 658, 681 (1898) (dissenting opinion).

Finally, the Court below also cited *Burleson v. County Board of Election Comm'rs of Jefferson County, supra*. A careful reading of that opinion reveals that although "[m]uch of the evidence at the trial was directed at the motive of the proponents of secession," 368 F. Supp. at 357, the court did not base its ruling upon that consideration. (In fact, just as did the district court here, it found motives were mixed. *Ibid.*).

The "primary purpose" rule constructed by the Fourth Circuit does not follow, then, from any established legal principles. At best, it represents the majority's attempt to balance the rights of black students to attend "only unitary schools," *Alexander v. Holmes County Board of Educ.*, 396 U.S. 19 (1969), against "the legitimate state interest of providing quality education for the state's children" (313a). That conception of a balancing process misconceives the issue, for the vindication of constitutional rights may not be sacrificed in the name of "quality education" or any other educational doctrine.²⁵

[T]he obligation of a school district to disestablish a system of imposed segregation, as the correcting of a constitutional violation, cannot be said to have been met by a process of applying placement standards, educational theories, or other criteria, which produce the result of leaving the previous racial situation existing, just as before

²⁵ Nothing in the Court of Appeals' opinion prevents whiter areas from separating from desegregating majority-black systems in order to provide "quality education" defined by some fanciful but impressive projection of expenditures prepared for the purpose. See text at p. 50 *infra*.

Whatever may be the right of these things to dominate student location in a school system where the general status of constitutional violation does not exist, they do not have a supremacy to leave standing a situation of such violation, no matter what educational justification they may provide, or with what subjective good faith they may have been employed. As suggested above, in the *remedying of the constitutional wrong*, all this has a right to serve only in subordination or adjunctiveness to the task of getting rid of the imposed segregation situation. (emphasis supplied)

Dove v. Parham, 282 F.2d 256, 258-59 (8th Cir. 1960).

Furthermore, the Fourth Circuit weights the balance not in favor of desegregation, but in the other direction. The Court of Appeals' test places the ~~burden~~ upon the petitioners—not the state officials, as in *Green*—to demonstrate that the primary motivation of those who seek to operate a separate system is to maintain segregation.

Because of the inherent difficulty of determining subjective mental states, inquiries into intent have generally been limited to those necessitated by statute. See *Palmer v. Thompson*, 403 U.S. 217, 224-25, 241-43 (1971).

In all of the cases which have dealt with the creation of new school districts amidst the process of eliminating the vestiges of segregation, except those in the Fourth Circuit, decision has turned on the *effects* of organizing new units, and not the motivations therefor. In *Lee v. Macon County Bd. of Educ.*, *supra*, slip op. at p. 11 (S.A. 11a), the Court wrote:

The City's action removing its schools from the county system took place while the city schools, through the county board, were under court order to establish a

unitary school system. The City cannot secede from the county where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on desegregation of the county school district.

Similarly, in *Stout v. Jefferson County Bd. of Educ.*, *supra*, 448 F.2d at 404 (S.A. 24a), the Fifth Circuit held that

... where the formulation of splinter school districts, albeit validly created under state law, have the effect² of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of *Swann v. Charlotte-Mecklenburg*, *supra*, recognize their creation.

² The process of desegregation shall not be swayed by innocent action which results in prolonging an unconstitutional dual school system. The existence of unconstitutional discrimination is not to be determined solely by intent. *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); *Bush v. Orleans Parish School Board*, 190 F.Supp. 861 (E.D. La., 1960); *aff'd sub nom. City of New Orleans v. Bush*, 366 U.S. 212, 81 S.Ct. 1091, 6 L.Ed.2d 239 (1961); *United States v. Texas*, 330 F.Supp. 235, Part II (E.D. Tex. 1971); *aff'd as modified*, *United States v. Texas*, 447 F.2d 441 (5th Cir., 1971).

As we have discussed above, the *Burleson* case involved no determination that illegal motives predominated; rather, the district court granted relief because of the unfavorable effects creation of a new district would have upon the rest of the area under decree. In *Aytch v. Mitchell*, 320 F. Supp. 1372 (E.D. Ark. 1971), the court found the movement for a separate district was racially motivated but rested his ruling on the impact which would be produced. And finally, in an analogous situation, the New Jersey Supreme Court, construing the federal and state policies in favor of equal educational opportunity, held that the Commissioner of

Education in that state could validly prevent the termination of a contract between school districts and the operation of separate systems where separation would result in an imbalance between the new entities and would have other deleterious effects upon the educational program. *Jenkins v. Township of Morris School Dist.*, — N.J. —, — A.2d — (1971) (S.A. 25a-53a). Interestingly, in discussing a nonbinding referendum against consolidation which had been conducted in the district which wished to terminate the contract, the court emphasized that intent was not the standard upon which judgment rested:

It has been suggested that it was motivated by constitutionally impermissible racial opposition to merger (*cf. Lee v. Nyquist, supra*, 318 F. Supp. 710; *West Morris Regional Board of Education v. Sills*, — N.J. — (1971)), but we pass that by since the commissioner made no finding to that effect and his powers were, of course, in no wise dependent on any such finding. (— N.J. at —, — A.2d at —) (S.A. 53a) (emphasis supplied)

A test of motivation is nothing less than regression to the time when "good faith," rather than results, was considered sufficient compliance with the State's obligation to desegregate. But "[t]he good faith of a school board in acting to desegregate its schools is a necessary concomitant to the achievement of a unitary school system, but it is not itself the yardstick of effectiveness." *Hall v. St. Helena Parish School Board*, 417 F.2d 801, 807 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969). This Court and the lower federal courts have for years measured the adequacy of desegregation efforts by their results, and not the intentions of those charged with the obligation to eradicate the dual system. There was, for example, no finding in *Green* that the New Kent County School Board

adopted a freedom-of-choice plan because they did not think it would work to desegregate the public schools of the county. It was sufficient that the plan did *not* work. Other decisions employed the same rationale. *E.g.*, *Goss v. Board of Educ. of Knoxville*, 373 U.S. 683 (1963) (minority-to-majority transfer plan); *Ross v. Dyer*, 312 F.2d 191, 196 (5th Cir. 1963) (brother-sister rule); *Clark v. Board of Educ. of Little Rock*, 426 F.2d 1935 (8th Cir. 1970) (geographic zoning).

In short, the majority's "primary purpose" test is at war with the standards traditionally applied in school desegregation cases. This is made less apparent because the majority opinion does not really treat the matter as a school desegregation case. But, if different standards are to apply to this situation, then we submit that those suggested by Judge Sobeloff are the proper ones.

There can be no question whatever that the establishment of an operative separate Emporia school system, whose student assignments are segregated from Greensville County's, is state action with a racially differential impact. Where there had formerly been one school unit which all city and county students attended, there would be created a city district, 50% white and a county district, 70% black, ringing the city. The fact that blacks and whites had not previously attended school together, except in token numbers would serve only to heighten the awareness of disproportion.

It would be entirely appropriate to view this action, therefore, as creating a racial classification, and to require a showing of a compelling state interest to justify the racially differential result. *E.g.*, *Kennedy Park Homes Assn., Inc. v. City of Lackwanna*, 436 F.2. 108(2d Cir. 1970) (per Mr. Justice Clark), *cert. denied*, 401 U.S. 1010.

(1971); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), pending on rehearing en banc; *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1969).²⁶

²⁶ The concerns which Emporia said prompted its decision to operate its own school system hardly amount to a compelling state interest which cannot be satisfied by other means which do not have racially discriminatory effects. For example, City witnesses said they doubted that the County would meet the increased expenditure needs associated with the operation of a unitary school system and also maintain the level of the educational program offered (236a, 289a-290a). The district court is not without the power, in the exercise of its equitable jurisdiction, to deal with such matters. In *Bradley v. School Bd. of Richmond*, 325 F. Supp. 828, 847 (E.D. Va. 1971), the same district judge directed that when a desegregation plan was effectuated, "the operation of city schools free from racial bars may not be cause for a reduction in educational quality or the discontinuance of courses, services, programs, or extracurricular activities traditionally offered." The court's order issued the same day enjoined the defendants to

(b) operate the public schools of the City of Richmond pursuant to the aforementioned desegregation plan 3 during the 1971-72 school year and thereafter, unless and until this order be vacated or modified, such operation not to be cause for any reduction in educational effort or the discontinuance or reduction of courses, services, programs, or extra-curricular activities which traditionally are offered.

The City Council of Richmond, which had been joined as a party upon motion of the plaintiffs, was directed to

raise or appropriate and authorize the expenditure of funds sufficient to operate the public schools in the City of Richmond in conformity with this decree and in particular shall raise or appropriate and authorize the expenditure of funds by the School Board for the acquisition of transportation facilities necessary for the implementation of plan 3 if so requested by the School Board and informed that, in the opinion of the School Board, the Board does not have sufficient funds at its disposal to acquire such facilities and also operate the public schools of the City of Richmond in conformity with other portions of this decree; . . . (*Bradley v. School Bd. of Richmond*, Civ. No. 3353 (E.D. Va., April 5, 1971)).

In *United States v. Georgia*, Civ. No. 12972 (N.D. Ga., Jan. 13, 1971), three federal district judges ruled that a county could not,

Not only is the "primary motive" test out of harmony with the decisions of this Court in the area of school desegregation, but it is imprudent to require federal courts carrying out their important functions in the desegregation process—who are confronted with attempts to establish new districts—to investigate the nebulous mental state of school officials. Judge Sobeloff's warning that "resistant white enclaves will quickly learn how to structure a proper record—shrill with protestations of good intent, all consideration of racial factors muted beyond the range of the court's ears" (322a) is the more significant when one considers that respondents developed an elaborate budget which—if actually implemented—would have resulted in a "superior" educational program, after deciding that they would like to make a more extensive record (187a).

when ordered to desegregate, suddenly terminate extra-curricular programs it had previously offered unless operation of the programs

is financially impossible [which shall be defined to mean that] the anticipated deficit for any activity is substantially greater than the deficit incurred in the operation of a similar activity at the Randolph County High School in previous school years, and there are no funds available from any source with which to offset such deficit (Order at pp. 4-5).

And see *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817 (5th Cir. 1969).

The City witnesses also complained that they had no voice on the county school board. But Virginia law provided for representation of the city's interests where there was a contract with the county. See Va. Code Ann. §22-99 (Repl. 1969). At the time of the hearing on preliminary injunction, in fact, two of four Greensville County School Board members were city residents (168a). But even assuming the validity of the city's complaint, it could have been dealt with in a way which did not involve reducing the effectiveness of the desegregation plan. Again, the district court was not without power to modify the requirements of state law concerning representation, as a part of its equitable remedy to disestablish the dual system. See *Haney v. County Bd. of Educ. of Sevier County*, 429 F.2d 364, 368-69, 372 (8th Cir. 1970).

Nothing better marks the inadequacy of so subjective a standard as *intent* to protect the desegregation decrees of federal courts from "yet another method to obstruct the transition from racially separated school systems to school systems in which no child is denied the right to attend a school on the basis of race" (313a) than the superficial manner in which the standard was applied to this case (see III *infra*). Affirmance of the ruling below can be expected to loose a plethora of attempts to "incorporat[e] towns for every white neighborhood in every city," *Lee v. Macon Bd. of Educ., supra*, slip op. at p. 11 (S.A. 11a), just as occurred in Jefferson County Alabama after the district court's approval of the first secession (see S.A. 54a-55a). And if the local district courts are to be required to make determinations of motive, there will inevitably be interminable testimony by numerous officials and truly "a quagmire of litigation" (334a). The "rule" adopted below may well turn out to be ineffective to reach even the most outrageous violations, let alone to properly carry forward the constitutional requirements with maximum accommodation of other interests.

III.

Even Were the Court of Appeals' Standard Acceptable, It Was Misapplied in This Case.

The Court of Appeals announced a new constitutional rule in this case and proceeded to make its own judgments, based on the record, and applying the new standard. We have argued above that the district court's order was well within its discretion in fashioning a remedy—and on that account alone ought not to have been disturbed. We have also argued that the Court of Appeals' new rule is unworkable and constitutionally wrong. But even if the Court of Appeals was correct about the standard to

be applied, it should have left the application of that standard in the first instance to the district court. Instead, it superficially skimmed the evidence and reached a result which is clearly unsupportable on the record.

It is perfectly apparent that the district judge never had an opportunity to apply a "primary motive" test. The comments of the court and of the attorneys during the two hearings establish that none of the parties conceived of any such issue. At the end of a colloquy during the December, 1969 hearing, for example, the district court said:

I think the people have legal rights of motivation but it may not be a factor the—it may not be a factor for the Court to even consider (252a).

The district court explicitly made no judgment about predominant motivation:

... the Court is satisfied that while their motives *may be* pure, and it *may be* that they sincerely feel they can give a better education to the children of Emporia, they also have considered the racial balance ... (emphasis supplied) (184a).

The motives of the city officials are, of course, mixed. ... (305a)

This Court's conclusion is buttressed by that of the district court in Burleson ... [where the court] ruled not principally because the section's withdrawal was unconstitutionally motivated ... [but because of] the impact on the remaining students' right to attend fully integrated schools ... (308a-309a).

Even the attorney for respondents did not conceive motive to be the issue:

[Recross Examination of George F. Lee by Mr. Warriner:]

Q. Has it been the intent, the purpose—well, I suppose intent and purpose are not proper for inquiry . . . (131a).

Instead of remanding to allow the district court, which was more familiar with the facts and circumstances and could weigh the demeanor and credibility of witnesses, to apply the newly defined standard, however, the Court of Appeals simply canvassed the record for itself and, without questioning any of the district court's findings, reversed its judgment. Cf. *Keyes v. School Dist. No. 1, Denver*, 396 U.S. 1215 (1969) (Mr. Justice Brennan, Acting Circuit Justice); *Northcross v. Board of Educ. of Memphis*, 397 U.S. 232 (1970). While we seriously question whether the Court of Appeals' action was correct, this Court has the same record before it and ought to make its own independent review of the facts in considering the Fourth Circuit's ruling.

Were this Court sitting to review factual findings of the Court of Appeals, we believe they would meet the "clearly erroneous" standard. When all of the evidence is considered, it overwhelmingly establishes that a separate city school system was conceived in response to, and represents a determined effort to evade, the desegregation decree of the district court.

The majority opinion below begins its analysis, after summarizing some of the facts, by looking to the racial change wrought by the establishment of separate districts (315a-316a). Because the county system's black population rises only six per cent, the Fourth Circuit concludes that "the effect of the separation [does] not demonstrate that

the primary purpose of the separation was to perpetuate segregation . . . " (316a). No comparison of the rise in white student percentage in the present county district and the new city district, or between the racial composition of the two new systems, is made. So far as the disproportion between city and county schools, the majority below intimates that since both systems will be majority black (albeit one 52% and the other 72%) that is the end of the matter because, in the Court's view, "[t]he Emporia city unit would not be a white island in an otherwise heavily black county". (315a).

The majority below conveniently ignores the district court's finding that the new district would create a "substantial shift in the racial balance" (304a).

Continuing, the Court of Appeals says that there is "strong" evidence that the city's motives were not racial (316a); the Court mentions but four points. First, the Court refers to Dr. Tracey's "understanding" that it was not the intent of the city to resegregate (316a). Of course, Dr. Tracey was an educational expert and not a psychologist, and the district court was not bound to accept his opinion about what the majority below perceives to be the ultimate issue in this case. In the district court's opinion, the following juxtaposition of sentences suggests that the lower court chose not to assign Dr. Tracey's "understanding" much weight:

Dr. Tracey testified that his studies concerning a possible separate system were conducted on the understanding that it was not the intent of the city people to "resegregate" or avoid integration. The Court finds that, in a sense, race was a factor in the city's decision to secede (307a).

The majority below also notes that Emporia proposed what Dr. Tracey considered a superior educational program. Indeed, it is not disputed that the program outlined in Dr. Willett's budget is a good one; the district court noted that "[t]he city clearly contemplates a superior quality education program" (297a). That is the beginning of the inquiry into motive, however, not its end. Uncontrovertibly this budget was prepared only after the temporary injunction was issued and the City had gained a better idea what evidence might best serve its cause (187a). The proposed budget may be some evidence of the city's motive in seeking to form its own school system, but in light of the significant amount of evidence more contemporaneous to the inception of the idea (which the Court of Appeals does not discuss, see below), it is hardly "strong" evidence.

Next, the Court of Appeals says:

In sum, Emporia's position, referred to by the district court as "*uncontradicted*," was that effective integration of the schools in the whole county would require increased expenditures in order to preserve education quality, *that the county officials were unwilling to provide the necessary funds*, and that therefore the city would accept the burden of educating the city children (emphasis supplied) (317a)

This is the linchpin of the entire Court of Appeals' holding, for as we read the opinion, this is what establishes to the satisfaction of the Court that Emporia's interest was in preserving "quality education," not in avoiding integration ratios it considered unfavorable. How "strong" is the evidence, then, if far from finding *uncontradicted* evidence of the county's unwillingness to adequately support a school

program, the district court actually rejected it! What the district court said was:

... The city's evidence, uncontradicted, was to the effect that the board of supervisors, *in their opinion, would not be willing to provide the necessary funds.* (emphasis supplied) (306a).

This was evidence from city officials, who had also spoken of eight years of antagonism between the city and the county (159a). The district court continued:

While it is unfortunate that the County chose to take no position on the instant issue, the Court recognizes the City's evidence in this regard to be conclusions; and without in any way impugning the sincerity of the respective witnesses' conclusions, this Court is not willing to accept these conclusions as factual simply because they stand uncontradicted.(306a)

Finally, the Court of Appeals refers to difficulties and awkwardness arising from Virginia's political structure, noting that as a separate city Emporia could not obtain an increase in school expenditures to benefit city children under the contract arrangement except with approval of the County Board of Supervisors, on which the city was not represented and for whose members city residents did not vote (317a-318a). We agree that Virginia's "unusual" political structure furnishes a *possible* motive for Emporia's actions, but we think that examination of the rest of the record—none of which was mentioned or explained by the majority opinion—negates the conclusion that that was the city's *actual* motive.

The city did not establish that it had ever attempted to increase school expenditures. While it was purportedly worried about the county's willingness to undertake addi-

tional expenditures it felt would be necessary to operate a unitary system, the city school board never had any discussions with the county board about the kind of desegregation plan which should be proposed (140a, 145a, 148a).

Without repeating the matters summarized in the Statement, above, we would direct the Court's attention to a few important subjects upon which evidence was introduced which are relevant to the question of the city's motive.

The timing of the city's move to operate a separate system strongly suggests racial motivation. The minutes of school board and city council meetings and the documentary evidence described in the Statement, all of which represent contemporaneous recordings of the events before litigation over this matter began, suggest very strongly that the idea of leaving the county system did not occur to city residents until substantial integration became likely. Indeed, city officials went so far as to testify that the court's decree was the "precipitating factor" because they were dissatisfied with the pairing plan.

The city attempted to establish that there had been longstanding dissatisfaction with the arrangement under which the county operated public schools for city children, and that it was merely coincidental that the interest in separation matured at the time the desegregation decree was entered. The city witnesses pointed to the "ultimatum" from Greenville County in 1968 which they claim forced them to accept the contract arrangement instead of being able at that time to establish the separate school system they desired to operate (233a).

The city's claim simply cannot be squared with the facts. Despite alleged serious difficulties between the town or city of Emporia and Greenville County which had continued for a considerable period of time, there had been no

prior attempt to establish a separate system—although under Virginia law, even while Emporia was a town, it could have petitioned the State Board of Education to operate as a school district separate from Greensville County. Va. Code Ann. §22-43 (Repl. 1969). Furthermore, it was open to Emporia immediately at the time of its transition from a town to a city, to bring the kind of lawsuit it brought in 1969 to establish equities in school buildings between the city and the county. Va. Code Ann. §15.1-1004 (Repl. 1964). Since this course of action was open to the city, it was not, as the Mayor charged, the inability to agree upon a price for the school buildings located in the city (119a) which necessitated the execution of the contract with Greensville County in 1968. While the County Board of Supervisors did eliminate the possibility of joint school operation (30a), the city was satisfied with the contract arrangement while the schools were segregated (163a, 235a), and the delay in executing the agreement was occasioned by negotiations about the terms of the contract; six different proposals were made by the city to the county (230a). Both the Mayor and the chairman of the city school board testified that they were satisfied with having the county educate city children up until the time the desegregation order was entered (163a, 235a).

On the other hand, city officials testified that they were aware that establishing a separate district would result in two systems of significantly different racial composition (the chairman of the city school board termed the increased black percentage in the county district an "adverse effect" of the secession (152a)), and they also stated their concern with avoiding withdrawal of students to private schools (see 290a-291a). Furthermore, the city's rush after June 25, 1969 to set up a new district by September, 1969 even if it required operating in churches and vacant buildings,

contrasts sharply with the budget it came up with in December, 1969, and casts doubts upon the city's claim to be interested in the best education of its children.

In sum, the claims of the city to a continuing and long-standing desire to free itself from county domination which prevented attainment of educational quality, are far outweighed by its unexplained failure to take any action until integration was to occur, its awareness that a separate system would contain a more palatable racial mix which might prevent white flight, and the very frankly expressed dissatisfaction on the part of the city residents and officials with the court's desegregation decree.

No less than total segregation, the attempt to preserve a racial mixture in the schools more to the liking of the dominant white population is "a living insult to the black children and immeasurably taints the education they receive." *Brunson v. Board of Trustees*, 429 F.2d 820, 826 (4th Cir. 1970). That is exactly what respondents' scheme would do if it were implemented. See the comments of Judge Winter, dissenting below (340a-341a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the case remanded with instructions to affirm the judgment of the district court.

Respectfully submitted,

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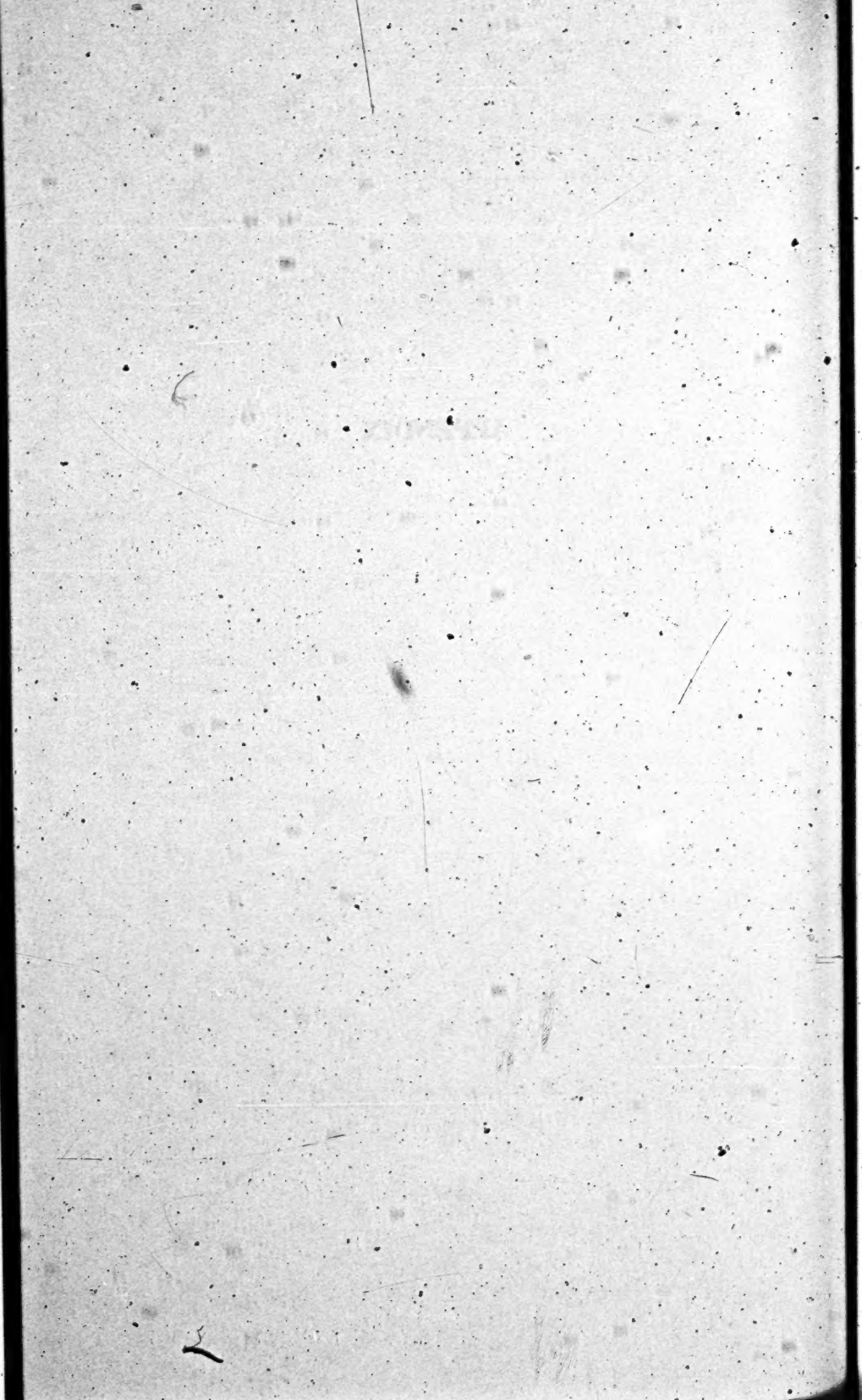
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Va. Code Ann.

§ 22-7. *Joint schools for counties or for counties and cities or towns.*—The school boards of counties or of counties and cities, or of counties and towns operating as separate special school districts, may, with the consent of the State Board, establish joint schools for the use of such counties or of such counties and cities or of counties and towns operating as separate special school districts, and may purchase, take, hold, lease, convey and condemn, jointly, property, both real and personal, for such joint schools. Such school boards, acting jointly, shall have the same power of condemnation as county school boards except that such land so condemned shall not be in excess of thirty acres in a county or city for the use of any one joint school. The title of all such property acquired for such purposes shall vest jointly in such school boards of the counties or counties and cities or counties and towns operating as separate special school districts in such respective proportions as such school boards may determine, and such schools shall be managed and controlled by the boards jointly, in accordance with such rules and regulations as are promulgated by the State Board. However, such rules and regulations in force at the time of the adoption of a plan for the operation of a joint school shall not be changed for such joint school by the State Board without the approval of the local school boards.

§ 22-30. *How division made.*—The State Board shall divide the State into appropriate school divisions, in the discretion of the Board, comprising not less than one county or city each, but no county or city shall be divided in the formation of such division.

§ 22-34. *When school boards to meet jointly to appoint superintendent.*—When a school division is composed of a city and one or more counties, or two or more counties, the school boards composing the division must meet jointly and a majority vote of the members present shall be required to elect a superintendent.

§ 22-42. *Counties and magisterial districts as school districts.*—Each magisterial district shall, except where otherwise provided by law, constitute a separate school district for the purpose of representation. For all other school purposes, including taxation, management, control and operation, unless otherwise provided by law, the county shall be the unit; and the school affairs of each county shall be managed as if the county constituted but one school district; provided, however, that nothing in this section shall be construed to prohibit the levying of a district tax in any district or districts sufficient to pay any indebtedness, of whatsoever kind, including the interest thereon, heretofore or hereafter incurred by or on behalf of any district or districts for school purposes.

§ 22-43. *Special districts abolished; exceptions; certain towns may be constituted separate districts.*—All special school districts and special town school districts except the special school district for the town of Lexington of Rockbridge County and the town of Bedford of Bedford County and the town of Fries of Grayson County, which are hereby preserved, are hereby expressly abolished, except the special town school district for the town of Kilmarnock in Lancaster County and all those special town school districts which have heretofore been established by and with the approval of the State Board, which are hereby expressly continued for the purpose for which established; provided, however, that the town of Herndon of Fairfax

County and the town of Colonial Beach of Westmoreland County, and incorporated towns having a population of not less than three thousand five hundred inhabitants, according to the last United States census, may, by ordinance of the town council and by and with the approval of the State Board, be constituted separate school districts either for the purpose of representation on the county school board, or for the purpose of being operated as a separate school district under a town school board of not less than three nor more than five members, appointed by the town council. In the event that such a town district be set up, to be operated by a board of three members, the members of such board shall be appointed in accordance with § 22-89, providing for the appointment of trustees in cities and of such members, one shall be designated by the town school board as a member of the county school board and entitled to serve as a member of the county board.

BOARDS OF CITIES AND TOWNS

§ 22-89. *Appointment and term.*—The council of each city except as otherwise provided by the city charter shall, on or before July first, nineteen hundred and thirty, appoint three trustees for each school district in such city, whose term of office shall be three years, respectively, and one of whom shall be appointed annually. The first appointment hereunder shall be one for one year, one for two years, and one for three years, beginning July first, nineteen hundred and thirty, and thereafter all appointments shall be for three years. If a vacancy occurs in the office of trustee at any time during the term, the council shall fill it by appointing another for such part of the term as has not expired. Within thirty days preceding the day on which the term of such trustees shall expire by limitation, and within the like number of days preceding the day on

which the term of any trustee shall expire by limitation in any subsequent year, such council shall appoint a successor to each such trustee in office, whose term shall commence when the term of predecessor shall have expired; provided, the office of any such trustee has not been abolished in redistricting the city; and, provided, that in the city of Norfolk the trustees shall be appointed in accordance with the provisions of § 22-89.1 rather than in accordance with the provisions of the city charter, and provided, further, that the common council of the city of Winchester shall select and appoint the school trustees for said city, and that in all other respects the provisions of this section shall apply to the city of Winchester. All acts heretofore done by the school board of the city of Winchester are hereby validated.

§ 22-99. *When city contracts with county to furnish facilities.* In the event that a city through authority granted in its charter enters into contract with the county school board of the adjacent county for furnishing public school facilities for the city where the county and city are constituted as one school system for the establishment, operation, maintenance and management of the public schools within the county and city, the school board of the county shall consist of one representative from each magisterial district of the county and each magisterial district (or ward) of the city, such incumbent to be appointed by the county school trustee electoral board, as provided by § 22-61; provided further that the members of the county school board representing the city shall be selected from a list of three citizens from each district (or ward) to be submitted by the city council of the city; any other law to the contrary notwithstanding.

BOARDS OF DIVISIONS COMPRISING TWO OR MORE
POLITICAL SUBDIVISIONS

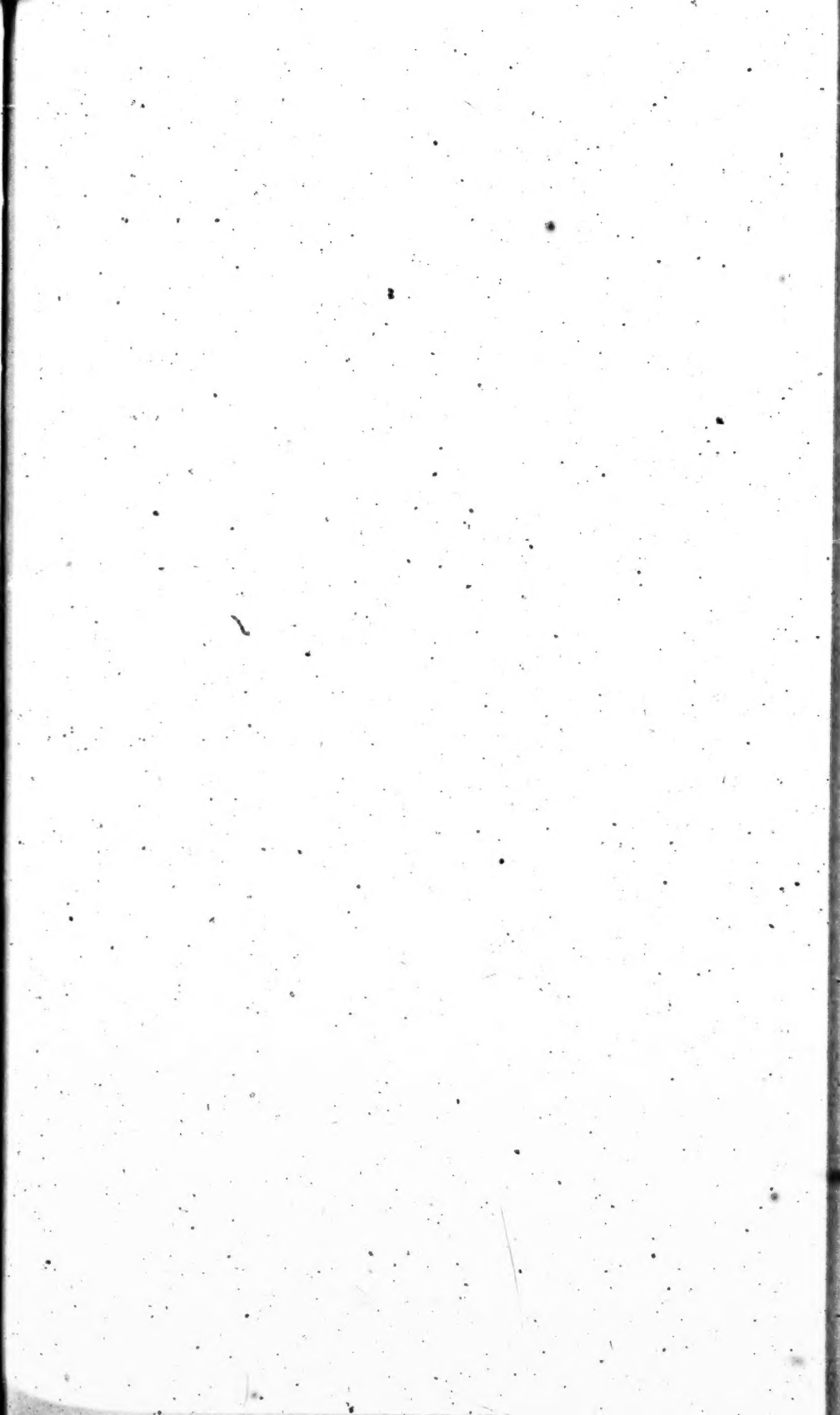
§ 22-100.1. *Single school board authorized.*—When the State Board of Education has created a school division, composed of two or more counties or one or more counties with one or more cities, the supervision of schools in any such school division may be vested in a single school board under the conditions and provisions as hereinafter set forth.

§ 22-100.2. *How board established.*—The school boards of such counties, county and city or counties and cities, comprising such school division, by a majority vote, may, with the approval of the governing bodies of such counties, or counties and cities, and the State Board of Education, establish such division school board in lieu of the school boards as at present constituted for the counties, county and city or counties and cities of such school division. Provided, however, that no such division shall be created which includes a county in which there is located a town operating as a separate school district.

§ 22-100.3. *How composed; appointment and terms of members; vacancies.*—Such division school board shall be composed of not less than six nor more than nine trustees, with an equal number of members from each county or city of the division and with a minimum board of six members, who shall be appointed by the county board of supervisors for a county and the city council for a city. Upon the creation of such school division there shall be appointed by the appropriate appointing bodies the required number of members to the division school board who shall serve until the first day of July next following the creation of such division. Within sixty days prior to that day each

appointing body shall appoint the required number of members of the division school board as follows: If there be three members, one shall be appointed for a term of two years, one for a term of three years, and one for a term of four years; if there be four members, one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, and one for a term of four years. Within sixty days prior to the first day of July in each and every year thereafter there shall be appointed by the appropriate appointing body for a term of four years beginning the first day of July next following their appointment, successors to the members of the division school board for their respective counties or cities, whose terms expire on the thirtieth day of June in each such year. The exact number of trustees for a county or city shall be determined by the governing bodies concerned within the limits above provided. Any vacancy occurring in the membership of the division school board from any county or city shall be filled for the unexpired term by the appointing body of such county or city. The governing bodies concerned shall jointly select for a term of four years one person who shall be a member of the division school board only for the purpose of voting in case of an equal division of the regular members of the board on any question requiring the action of such board. Such person shall be known as the tie breaker.

If the governing bodies are not able to agree as to the person who shall be the tie breaker, then upon application by any of the governing bodies involved to a circuit court having jurisdiction over a county or city embraced in such school division, the judge thereof shall name the tie breaker and his decision shall be final.



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E. ROBERT SEAVER, CLERK

In The

Supreme Court of the United States

October Term, 1971

No. 70-188

PECOLA ANNETTE WRIGHT, ET AL.,
Petitioners,

v.

COUNCIL OF THE CITY OF EMPORIA, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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In The
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v.

COUNCIL OF THE CITY OF EMPORIA, ET AL.,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit**

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Respondents believe that the question presented is:

Was the Court of Appeals correct in deciding that the constitutionally protected rights of petitioners would not be violated if the City of Emporia, an independent political subdivision of the Commonwealth of Virginia, operates a unitary school system separate from that of the County of Greenville.

Petitioners' statement of the question presented (PB 2¹)

¹The following designations will be used in this brief:

PB—Petitioners' brief

RA—Appendix to this brief of respondents

SA—Appendix to petitioners' supplemental brief in support of petition for writ of certiorari

is misleading, inaccurate and not clear. It is misleading in that it ignores that the City of Emporia is an independent political subdivision for all governmental purposes—it is not just a school district.

It is inaccurate in stating that “the changed boundaries result in less desegregation” for two reasons. First, no boundaries have been changed, as such—rather, a “town” became a “city” under long-standing state transition statutes and no boundaries were changed. Second, operation of a separate school system by the City would not result in “less desegregation” in either the County or the City.

It is not clear what petitioners mean in stating that “formerly the absence of such boundaries was instrumental in promotion segregation.”

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Va. Const. Art. IX, § 133, which was in effect until July 1, 1971, is set forth at RA 1, and Va. Const., Art. VIII, § 5(a) and § 7, which became effective July 1, 1971, are set forth at RA 2.

2. Va. Code Ann. §§ 15.1-978 through 15.1-1010 (1950), which relate to the transition of towns to cities in the Commonwealth of Virginia. Va. Code Ann. § 15.1-982 (1950), as in effect on July 31, 1967, is set forth in part at RA 2.

3. Va. Code Ann. § 22-93, is set forth at RA 3 and § 22-97, is set forth at RA 3, *et seq.*

4. The following sections of the Virginia Code, which are set forth in the appendix to petitioners' brief, were amended, effective July 1, 1971, and are set forth, as amended at RA 2, 3, 7 respectively: §§ 22-30, 22-43, 22-100.1 and 22-100.3.

3

5. Va. Code Ann. §§ 22-34 and 22-100.2, set forth in the appendix to petitioners' brief, were repealed effective July 1, 1971.

STATEMENT

Transition of Emporia from Town to City

On September 1, 1969, Greensville County had a public school population of 2,616 children of whom 728 were white and 1,888 were Negro. On the same date, the City of Emporia had a public school population of 1,123 of whom 543 were white and 580 were Negro (304a).² Four school buildings—three elementary and one high—are physically located in Greensville County. Three school buildings—two elementary and one high—are physically located in the City (294a).

Prior to July 31, 1967, Emporia was an incorporated town and, as such, was a part of Greensville County, Virginia. On July 31, 1967, the Town of Emporia became an independent city of the second class pursuant to the provisions of the Code of Virginia.³ The evidence is uncontradicted that the motivating factor behind the transition was the desire of Emporia's elected officials to have Emporia receive the benefits of the state sales tax that had been recently enacted and to eliminate other economic inequities (123a, 124a). There has been no charge by petitioners that the decision to become a city was in any way motivated by the school desegregation situation. There has been no finding by the District Court to impugn the motives or purposes of the City in effecting this transition.

The Court of Appeals pointed out:

² References are to the Single Appendix filed herein.

³ Va. Code Ann. § 15.1-982 (RA 2)

At the time city status was attained Greenville County was operating public schools under a freedom of choice plan approved by the district court, and *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), invalidating freedom of choice unless it "worked," could not have been anticipated by Emporia, and indeed, was not envisioned by this court. *Bowman v. County School Board of Charles City County*, 382 F. 2d 326 (4th Cir. 1967). The record does not suggest that Emporia chose to become a city in order to prevent or diminish integration. Instead, the motivation appears to have been an unfair allocation of tax revenues by county officials (314a).

The Contract With Greenville County

On April 10, 1968, the City and County entered into an agreement pursuant to which the County was to provide specified services, including schools, for the people of Emporia for a period of four years (32a). It provided for earlier termination under certain circumstances. As evidenced by minutes of the County Board of Supervisors, this contract was entered into by the City under the threat of expulsion by the County of the City children from the County schools at mid-term (31a). The District Court stated:

Only when served with an "ultimatum" in March of 1968, to the effect that city students would be denied access to county schools unless the city and county came to some agreement, was the contract of April 10, 1968, entered into (305a).

Further, the contract was entered into only after the City School Board had fully explored the feasibility of operating its own system immediately upon transition and after negotiations toward establishing a joint school system with the County had failed (227a, et seq.). As found by the District Court:

Ever since Emporia became a city, consideration has been given to the establishment of a separate city system (305a).

The City School Board determined that for practical reasons it was impossible to establish its own system at that time (227a).

The District Court also found that the City's second choice "was some form of joint operating arrangement with the county, but this the county would not assent to" (305a). The minutes of the County Board of Supervisors make this clear (30a).

Petitioners state that instead of filing suit against the County to establish the City's equity in the school property, in 1967, the City "negotiated for preferred contractual terms (see 230a)" (PB 5). It is obvious that had the City chosen to file suit at that time the County would have refused to permit City students to attend the County schools during the pendency of that suit. Therefore, as a practical matter, that choice was not available to the City. Further, the record is clear that "preferred contractual terms" were not obtained by the City—on the contrary, the County's terms were forced upon the City (230a-233a).

The contract of April 10, 1968 terminated after the 1970-71 school year as the District Court recognized it would (296a). Were it not for this proceeding, the City of Emporia would be free to operate its own system during the current school year. Actually, it would be obligated so to do under the law of the Commonwealth of Virginia.

Emporia's Decision to Operate Own School System

During the 1968-69 school year, the County operated under a freedom-of-choice plan which had been approved by the District Court. On June 25, 1969, the District Court

enjoined the County to disestablish the existing dual school system and to replace it with a racially unitary system. Subsequently, a plan was approved which required the assignment of all pupils in the system as follows (295a):

<i>School</i>	<i>Grades</i>
Greensville County High	10, 11, 12
Junior High (Wyatt)	8, 9
Zion Elementary	7
Belfield Elementary	5, 6
Moton Elementary (now Hicksford)	4, 5
Emporia Elementary	1, 2, 3
Greensville County Training	Special Education

Under this plan, an Emporia child who begins in the first grade of the Greensville system is required to attend six different schools—possibly seven—during the course of his elementary and secondary education. In grades 1-3 and in grades 10-12, he would attend schools located in the City; in the remaining grades, he would be required to go outside the City of his residence to attend schools located in the County.

After the order of June 25, 1969 was entered by the District Court, the bi-racial (125a) City School Board determined to operate its own schools for 1969-70. It planned a racially unitary system in which all elementary school children—black and white—would be assigned to one school and all high school children—black and white—would be assigned to another school (129a). The City system would have been approximately 52% black and 48% white. The County system would then have been approximately 72% black and 28% white. The combined system is approximately 66% black and 34% white (304a, 316a).

Petitioners repeatedly refer to the fact that it was the "desegregation" decree of June 25, 1969 that caused the

City to decide to operate its own system (e.g. PB 8, 9, 11, 13). They argue that the separate system "was conceived in response to, and represents a determined effort to evade, the desegregation decree of the district court" (PB 48); that the timing of the city's decision "strongly suggests racial motivation" (PB 52); and that "the claims of the city to a continuing and long-standing desire to free itself from county domination which prevented attainment of educational quality, are far outweighed by its unexplained failure to take any action until integration was to occur, [and] its awareness that a separate system would contain a more palatable racial mix which might prevent white flight * * *" (PB 54).⁴

Throughout their brief, petitioners attempt to convey the impression that the City was satisfied with the system being operated by the County until the "pairing plan" required by the Order of June 25, 1969 was put into effect (e.g. PB 5, 13). The record is clear that while the City was satisfied with the assignment plan in effect prior to that order (freedom of choice), it was not satisfied with the con-

⁴ Petitioners state on pages 8 and 9 of their brief that the City offered to accept county students into the city system on a tuition basis. They neglect to state that the City included in the assignment plan it submitted to the Court in December 1969 a provision that no students would be accepted from outside the City until approval was obtained from the District Court (224a, 225a). This action was taken after the hearing on the preliminary injunction in August 1969 when the District Court expressed some concern about the City's plan to accept in its system students residing in the County on a tuition, no transportation basis. While the City intended to accept such students on a "first come, first served" basis without regard to race, it recognized that this plan had apparently cast doubt upon the good faith intention of the City to operate a unitary system composed of approximately an equal number of white and Negro students. Therefore, while it believed such doubt to be unjustified, it decided to affirmatively incorporate in its plan that it would accept no students from another school district without first obtaining approval of the District Court (225a). The District Court so found (296a).

tractual arrangement under which it had no control over the system nor was it satisfied with the system itself.⁵

The District Court accurately stated Emporia's principal reason for its decision to operate its own system to be:

Emporia's position, reduced to its utmost simplicity, was to the effect that the city leaders had come to the conclusion that the county officials, and in particular the board of supervisors, lacked the inclination to make the court-ordered unitary plan work. The city's evidence was to the effect that increased transportation expenditures would have to be made under the existing plan, and other additional costs would have to be incurred in order to preserve quality in the unitary system. The city's evidence, uncontradicted, was to the effect that the board of supervisors, in their opinion, would not be willing to provide the necessary funds (305a, 306a).

The testimony of the Chairman of the City School Board with respect to the reasons for which the City decided to operate its own schools is found on pages 236a through 242a of the appendix. In summary, the reasons behind the decision were that, in the opinion of the City, the County was not able to operate a unitary school system successfully, that the County would not be willing to expend the necessary funds to make a success of a unitary school system, that the City was willing to do so, that a successful public school system was a necessary part of the future well being of the

⁵ In support of their claim that the City was satisfied with the County system, petitioners refer the Court to pages 163a and 235a. At page 163a, Mr. Lee, the mayor of the City testified:

"We have never been happy with the system. . . ."

At page 235a, Mr. Lankford, chairman of the City School Board testified that he thought the County had operated a reasonably effective system but that the City did not plan to renew the contract.

At page 147a, Mr. Lankford testified:

"I personally, and I think my School Board since we were formed two years ago, have never been happy [with the County system]."

community, and that Emporia must control its own system in order to accomplish these ends.*

Additionally, that the frequent transfers from building to building required under the plan was a source of primary concern is illustrated by the following colloquy between the District Judge and the Chairman of the City School Board:

The Court: What you are really saying, Mr. Lankford, everybody has been at you, the Council (sic) and myself and I don't mean to, but I want to get it straight. What you are really saying is that the reason that precipitated this, and the primary reason, is the fact that your children and all the children have got to transfer schools more frequently than they have in the past and you consider that to be bad?

The Witness: I consider that to be bad, yes, sir, and the—

The Court: I am certainly in accord with you that it is not the best thing, but that is really the reason, is it not?

The Witness: That is the basic reason that we wish to operate our city school (152a, 153a).

The Mayor of the City testified that the order of the District Court did cause the City "to try and act with haste" (121a). However, the concern of the City was that its children would attend six different schools from the first grade through high school, that the City was paying more than its

* At the time of the hearings in the District Court on August 8, 1969 and December 18, 1969, the contract of April 10, 1968 was in effect. The evidence was that the County completely controlled the operation of that system and that the City had no control over the school budget, over the selection of the school board, over the curriculum, over the hiring of teachers, over the salaries to be paid to teachers, or over any other matter relating to the operation of the schools (158a, 159a, 242a). At the present time, the contract now having terminated, the situation is the same.

fair share of the cost of the County School System which cost would be increased by the increased transportation required, that such money could be applied to provide a better school program for city children—black and white—if all its elementary students were educated in one school and all its high school children were educated in another school (121a, 122a):

“Therefore, it is true—and freely conceded—that the assignment plan which was ordered by the District Court on June 25, 1969 precipitated the decision of the City to accelerate the time it would operate its own system. However, it is equally true—and here emphasized—that it was not the *integration* aspects of the plan that precipitated the decision.”

**Quality of Unitary System to be Operated by Emporia
Superior to that of County**

On August 1, 1969, the petitioners filed a supplemental complaint in, and added the School Board and Council of the City of Emporia as parties defendant to, the action pending in the District Court. Until that time, the action was an “ordinary” desegregation suit to which the County school authorities were the only parties defendant. By the supplemental complaint petitioners sought to enjoin the City from operating its own school system and on August 8, 1969, the

“The Chairman of the City School Board testified:

Q. Now, at the present time I believe you testified that the ratio is approximately 60-40 in the county? A. Yes, sir, to my knowledge that is about right.

Q. And if the city formed the city school system your testimony is it would be approximately 50-50? A. Approximately.

Q. In the city? A. Yes, sir.

Q. Is this a matter of great moment to the City of Emporia?

A. No, sir.

Q. Is that the motivating influence of the City of [Emporia].

A. No, sir (152a).

District Court entered an order temporarily enjoining the City from so doing (195a). The City decided not to appeal the order granting the temporary injunction but rather to follow the course of presenting the City's case in an orderly manner to the District Court at a hearing on whether the injunction should be made permanent (186a, 187a). The earliest date that the District Court could assign for such a hearing was December 18, 1969 (188a).

The City then proceeded to prepare itself to be in a position to put its system in effect just as soon as it was permitted to do so. It employed Dr. H. I. Willett, who had been superintendent of the Richmond, Virginia, public school system for 22 years and who was then associated with Virginia Commonwealth University, to design a budget specially tailored to meet the needs and problems of the unitary system which Emporia proposed to operate (252a, 259a, 261a, 262a).⁸ Dr. Willett's budget, which was adopted by the City School Board and the City Council (200a, 287a), is included in the Appendix beginning at page 202a. The budget message is particularly significant (206a-215a).

The City also employed Dr. Neil H. Tracey, Professor of Education at the University of North Carolina,⁹ to evaluate the present system as it was being operated by the County of Greenville, to compare it with the system proposed by the

⁸ On at least two occasions in their brief (PB 19, 50), petitioners refer to the fact that the proposed budget was not prepared until after the temporary injunction had been entered "and the City had gained a better idea what evidence might best serve its cause" (PB 50). Obviously, a budget would not have been prepared by the City prior to its decision to operate its own system and that decision was not made until a short time before the temporary injunction was entered.

⁹ Dr. Tracey was erroneously referred to in the opinion of the District Court as being from Columbia University and in the transcript of the proceedings of December 18, 1969 (266a, et seq.) as being from the University of New York.

City of Emporia, and to testify at the hearing on whether the injunction against the City should be made permanent.¹⁰ At that hearing on December 18, 1969, Dr. Tracey testified that the assignment plan ordered by the District Court for Greensville County has an adverse effect from an educational standpoint (272a-274a). In summary, Dr. Tracey's conclusions were based on the following factors:

1. Funds which could otherwise be applied to educational purposes must be applied to the expenses of providing transportation (274a).

2. Time that is required to transport the pupils serves no useful educational purpose (274a).

3. Educational resources including teachers, text materials, library materials and other instructional materials must be divided among the buildings in which the various grades are taught. With respect to the elementary grades, this results in curtailing the resources available to the pupils housed in each building. Since most children have an achievement range of about double the number of years of their grade designation, the curtailment of the educational resources results in the curtailment of the range of instructional and in-

¹⁰ On page 19 of their brief, petitioners state that Dr. Tracey "testified that it was his 'understanding' that he was not serving the City in 'any attempt to resegregate or to avoid desegregation' (269a)." Dr. Tracey's testimony on this point was: [questions by Mr. Kay].

Q. Now, sir, at the time that you were approached to accept this assignment, did you place any conditions on your acceptance? And if so, what were they? A. Yes, I placed this basic condition on acceptance of any such assignment, that the intent of the people involved, the Emporia people in this instance, should be specifically not related to any attempt to resegregate or to avoid desegregation or to avoid integration.

Q. And, if you had ascertained that this was the intent, what was your understanding with the City? A. My understanding was that I would not serve in this capacity, at all (269a).

dependent educational opportunities available to the pupils (272a, 273a).

Furthermore, Dr. Tracey testified that the effect of historic segregation of the races is not eliminated purely by a proportionate mixing of the races. In his opinion, special educational opportunities must be afforded to solve these problems (269, 270a). Dr. Tracey testified that an examination of the Greenville County System indicated that the extra effort required to provide these opportunities was not being made (271a, 272a, 274a). On the other hand, an examination of the system proposed by Dr. Willett, which had been adopted to the extent possible by the City, indicated that it would make the necessary effort (275a, et seq.). In this connection, Dr. Tracey studied the budget message and budget (275a) prepared for the City School Board by Dr. H. I. Willett.

Petitioners state that Dr. Tracey compared the educational programs of the County with those proposed by the City "without reference to the racial composition of the two systems" (PB 19). In support of that statement, they quote fragments of answers of Dr. Tracey to two different questions (PB 20). Neither the questions nor the answers cited by petitioners support the conclusion that Dr. Tracey's comparisons were made "without reference to the racial composition" of the systems (269a, 270a). Dr. Tracey's entire testimony was directed to the point that special educational effort must be exerted to eliminate the effects of segregation (270a)¹¹

¹¹ On direct examination, Dr. Tracey testified:

Q. Is a special effort required by locality and school officials to provide such a system, in your opinion?

A. Yes, special effort. There are two kinds of high level support and a particular orientation on the part of the public and the school officials to meet each child in this way (271a).
Dr. Tracey went on to testify why the County was not providing this support and why the proposed program of the City would.

and to his study of the existing and proposed systems to ascertain which was more likely to provide that effort. In his study, Dr. Tracey examined "the organizational pattern and effects on that organizational pattern of the separate or possible separate school systems for Emporia" (269a). Such study necessarily involved a consideration of the racial composition of the two systems. Dr. Tracey did testify that "no particular pattern of mixing has in and of itself, has any desirable effect" (270a). He also testified that he knew of no study that would indicate whether an increase in the ratio of Negro to white children from 60-40 to 70-30 would have any effect on the educational process (281a).

In summary, the City has committed itself to assign all elementary pupils in the City to one school building and all high school pupils to one school building; to assign faculty on a completely integrated basis; to rename the former Emporia Elementary School the R. R. Moton Elementary School; to accept no students from other school divisions or districts until approval is obtained from the District Court (224a, 225a).¹² Further, it has committed itself insofar as

¹² The following resolution was adopted by the City School Board and filed as the plan under which it proposed to operate if permitted to do so (Ex E-F, Hearing of December 18, 1969, 224a):

Mr. Lankford introduced the following Resolution, which after considerable discussion by the Board, was unanimously adopted:

If permitted by the United States District Court to operate its own school system, the School Board of the City of Emporia will do so according to the following plan:

1. Assignment of pupils and faculty shall be made on a completely racially integrated basis resulting in a racially unitary system. All pupils of the same grade in the system shall be assigned to the same school, with the possible exception of those pupils assigned to a special education program which program will be conducted on a racially integrated basis. It is contemplated that all grades, kindergarten through the sixth grade, shall be located and conducted in one building (the former Emporia Elementary School to be renamed R. R. Moton Elementary School) and all grades, seventh through twelfth, shall be located

possible to operate a quality system designed to meet the problems that naturally occur in the transition from a basically segregated system to a massively integrated one.

The City system would contain 580 Negro children and 543 white children—a ratio of 52% Negro to 48% white. The County system would contain 1,888 Negro children and 728 white children—a ratio of 72% Negro to 28% white. The combined systems contained 2,477 Negro children and 1,282 white children—a ratio of 66% Negro to 34% white (304a).

Petitioners introduced no evidence in this case indicating any dissatisfaction on their part with the City's plan to operate its unitary school system.¹³

Its evidence at the hearing on August 8, 1969 upon the motion for a temporary injunction was restricted to testimony from the superintendent of schools, the mayor of the City, and the chairman of the City School Board together with exhibits introduced through those witnesses. At the hearing on December 18, 1969 to determine whether the injunction should be made permanent, it was stipulated that the evidence introduced at the August hearing could be considered

and conducted in one building (the former Greenville County High School to be renamed Emporia High School).

2. The schools will sponsor and support a full range of extracurricular activities and all activities conducted by or in the public school system will be on a racially integrated basis.

3. Any bus transportation that is provided will be on a racially integrated basis.

4. No students will be accepted from other school divisions or districts until approval is first obtained from the United States District Court.

¹³ The record does not disclose the residence of the petitioners at the times pertinent to the issues here involved—thus, it is not known whether they all resided in the County, whether they all resided in the City, or whether some resided in City and some in the County.

as received in the December hearing (Transcript of proceedings; 12/18/69, p. 3). Petitioners introduced no additional evidence.

Decision of the District Court

On page 17 of their brief, petitioners quote at length from the opinion of the District Court delivered from the bench on August 8, 1969 at the hearing on the temporary injunction.

There can be no doubt that the District Court's impression of this case at the time of that hearing changed drastically after hearing the evidence presented by the City on December 18, 1969. During the hearing on December 18, the District Judge stated:

I think the matter now is in a different posture and less difficult in the calmness of December than it was (240a).

* * *

* * * [A]s I said before, this is a much—a more different situation than it was in August (248a).

Therefore, it is the findings made by the District Court after the evidence was fully developed that are controlling. Certainly, they supercede any conflicting findings made after the expedited and peremptory hearing on the temporary injunction. It is to the later findings we now turn.

(a) PROPOSED SYSTEM

With respect to the system Emporia desires to operate, the District Court found:

The city clearly contemplates a superior quality educational program. It is anticipated that the cost will be such as to require higher tax payments by city residents.

A kindergarten program, ungraded primary levels, health services, adult education, and a low pupil-teacher ratio are included in the plan, defendants' Ex. E-G at 7, 8 (297a).

* * *

The Court does find as a fact that the desire of the city leaders, coupled with their obvious leadership ability, is and will be an important facet in the successful operation of any court-ordered plan (306a).

* * *

This Court is satisfied that the city, if permitted, will operate its own system on a unitary basis (307a).

(b) REASONS FOR EMPORIA'S DECISION

With respect to the reasons behind the desire of Emporia to operate its own system, the District Court found:

The motives of the city officials are, of course, mixed. Ever since Emporia became a city consideration has been given to the establishment of a separate city system (305a).

* * *

Emporia's position, reduced to its utmost simplicity, was to the effect that the city leaders had come to the conclusion that the county officials, and in particular the board of supervisors, lacked the inclination to make the court-ordered unitary plan work. The city's evidence was to the effect that increased transportation expenditures would have to be made under the existing plan, and other additional costs would have to be incurred in order to preserve quality in the unitary system. The city's evidence, uncontradicted, was to the effect that the board of supervisors, in their opinion, would not be willing to provide the necessary funds (305a, 306a).

* * *

The Court finds that, in a sense, race was a factor in the city's decision to secede (307a).

It is significant that while the District Court found the motives of the city officials to be mixed and that, in a sense, race was a factor, it did not find that the reasons of the City were related to obtaining "a more palatable racial mix" (PB 54).

(c) EFFECT ON COUNTY

With respect to the effect of the establishment by Emporia of a separate system, the District Court found:

The establishment of separate systems would plainly cause a substantial shift in the racial balance. The two schools in the city, formerly all-white schools, would have about a 50-50 racial makeup, while the formerly all-Negro schools located in the county which, under the city's plan, would constitute the county system, would overall have about three Negro students to each white [footnote omitted] (304a).

* * *

Moreover, the division of the existing system would cut off county pupils from exposure to a somewhat more urban society (306a).

* * *

While the city has represented to the Court that in the operation of any separate school system they would not seek to hire members of the teaching staff now teaching in the county schools, the Court does find as a fact that many of the system's school teachers live within the geographical boundaries of the city of Emporia. Any separate school system would undoubtedly have some effect on the teaching staffs of the present system (307a).

In sum, the District Court was primarily concerned with the shift in racial balance that would result if Emporia estab-

lished its own system. Secondly, it commented upon the county pupils' exposure to a somewhat more urban society¹⁴ and an unspecified effect on the teaching staffs. It was upon those factors alone that the District Court prohibited the City from exercising the powers and fulfilling the duties imposed upon it by the law of Virginia.

In concluding its opinion, the District Court clearly indicated that it considered any possible adverse effects resulting from separation to be purely speculative:

But this [fact that Emporia's system will be unitary] does not exclude the *possibility* that the act of division itself *might* have foreseeable consequences that this Court ought not to permit (emphasis supplied) (307a).

* * *

This Court is most concerned about the *possible* adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs (emphasis supplied) (308a).

Having decided to prohibit Emporia from establishing its system for the reasons recited above, the District Court added:

If Emporia desires to operate a quality school system for city students, it may still be able to do so if it presents a plan not having such an impact upon the rest of the area now under order. * * * Perhaps, too, a separate system might be devised which does not so prejudice the prospects for unitary schools for county as well as city residents. This Court is not without the

¹⁴ According to the 1970 census, Emporia had a population of 5300. U.S. Dept. of Commerce Bureau of Census, *1970 Census of Population, General Population Characteristics PC (1)—B 48 Virginia* (October 1971). According to the mayor of Emporia, the wealth of the area is located in the County and not the City (291a). Thus, the benefits of being exposed to the "urban society" of Emporia would appear somewhat limited, at best.

power to modify the outstanding decree, for good cause shown, if its prospective application seems inequitable (309a).

If the unitary plan proposed by the City does not satisfy the test of equity, it is difficult to envision how it could be modified in a manner which would permit the City to accept the invitation of the District Court.

Decision of the Court of Appeals

The Court of Appeals reversed the District Court and instructed that the injunction against the City be dissolved. Its decision was based entirely upon the factual findings of the District Court. In summary, the Court of Appeals held:

(a) The power of state government to determine the geographic boundaries of school districts is ordinarily plenary (311a, 312a).

(b) Such power is limited when the exercise thereof is for the purpose of perpetuating invidious discrimination (312a).

(c) If the effect of the boundary determination is resegregation, a discriminatory purpose will be inferred (312a).

(d) If the effect of the boundary determination is only a modification of the previous racial ratio, then, further inquiry into the purpose of that change must be made (313a).

(e) Relying only upon the findings of fact made by the District Court, the Court of Appeals held that neither the effect nor the purpose of the boundary determination was in violation of the constitutional rights of petitioners (316a).

The decision of the Court of Appeals will be more fully discussed subsequently.

However, attention is now called to the fact that petitioners throughout their brief refer to the Court of Appeals as having given consideration to the *motive* of the City officials in deciding to establish a separate school system (PB 26, 29, 37, 40, 45, 46). Whether by accident or design, petitioners inaccurately portray that the Court of Appeals tested the constitutionality of Emporia's action by determining the "primary motive" (313a, 316a, 318a) of the local officials. Of course, it was the "purpose" of the action, rather than the "motive" behind that action, that was considered by the Court of Appeals and this is clearly stated in the opinion. Petitioners attempt to negate the distinction between purpose and motive by a footnote on page 38 of their brief.

Petitioners quote at length from Judge Sobeloff's dissenting opinion in *United States v. Scotland Neck City Board of Education*, 442 F.2d 575 (4th Cir. 1971), stating that it was a companion case to the instant one (PB 27, 28). Though the cases were decided at the same time, the *Scotland Neck* case is not truly a companion to the *Emporia* case. They were tried by different district courts and involve substantially different facts.¹⁵

SUMMARY OF ARGUMENT

I

Under the law of Virginia counties and cities now are and historically have been independent of each other politically, governmentally and geographically. Each has the separate

¹⁵ Judge Sobeloff did not participate nor vote in the *Emporia* case. If any significance can be attached to his views so far as this case is concerned, then it should be noted that Judge Butzner, who likewise did not participate in it, was a part of the majority in the *United States v. Scotland Neck City Bd. of Educ.*, and must, therefore, be assumed to be in accord with the principles set forth by the majority in the *Emporia* case.

and independent right and duty to operate and maintain its own school system. Emporia became a city on July 31, 1967 pursuant to a law that has existed since at least 1892 and, at that time, became obligated to maintain its own school system.

II

The proposed action of the City to operate and maintain an independent school system will not violate any of the constitutional rights of petitioners as those rights have been defined by the most recent decisions of this Court. The constitutional rights of petitioners, which in this case are grounded upon the equal protection clause of the Fourteenth Amendment, require that they be permitted to attend a unitary, non-racial system of public education. The corresponding duty of the local school authorities is to provide such a system. Petitioners are not entitled to demand, and local school authorities are not required to provide, any particular plan to accomplish that result.

In this case, the proposed action by the City of Emporia will result in a racially unitary system of public education in the City in which approximately 52% of the school population will be Negro and 48% will be white. All students in the elementary grades will attend one school and all students in the high school grades will attend another school. The County system, which will also be racially unitary, will contain approximately 72% Negro students and 28% white students. The ratio of the combined system is approximately 66% Negro and 34% white. The shift in racial balance resulting from the proposed separation of Emporia from the County system denies to no one any constitutional right to which he is entitled. Further, no other result of the proposed separation constitutes the violation of any constitutional right of petitioners.

The proposed action of the City will stand any constitutional test to which it is fairly subjected whether that test be the one announced in the opinion of the Fourth Circuit, the one proposed by Judge Winter in his dissent to the opinion of the Fourth Circuit, or the one proposed by Judge Sobeloff in his dissent to the opinion of the Fourth Circuit in *United States v. Scotland Neck City Board of Education*, *supra*.

Therefore, the City of Emporia should not be restrained from exercising the powers and fulfilling the duties imposed upon it by the Constitution and laws of Virginia.

ARGUMENT

I

The Law of Virginia Vests the Power and the Duty Upon the City of Emporia to Operate and Maintain a Public School System

A.

**COUNTIES AND CITIES OF VIRGINIA ARE
INDEPENDENT OF EACH OTHER**

In *City of Richmond v. County Board*, 199 Va. 679 (1958) at 684, the Supreme Court of Virginia stated:

In Virginia, counties and cities are independent of each other politically, governmentally and geographically. Each of them, within its particular boundaries, is a co-equal political subdivision agency of the State.

In *Murray v. Roanoke*, 192 Va. 321 (1951) at 324, the Virginia Court held:

In Virginia, counties and cities are separate and distinct legal entities. Each is a subordinate agency of the State government, and each is invested by the legisla-

ture with subordinate powers of legislation and administration relative to local affairs in a prescribed area. Citizens of the counties have no voice in the enactment of city ordinances, and conversely citizens of cities have no say in the enactment of county ordinances.

That this has been the law historically in Virginia is demonstrated by *Supervisors v. Saltville Land Co.*, 99 Va. 640 (1901).

This principle is applicable to a city that became such under the provisions of the law providing for the transition of towns to cities. In *Colonial Heights v. Chesterfield*, 196 Va. 155 (1954), the Supreme Court of Virginia held at 167:

The town, upon becoming a city, separates from a political subdivision of which it was a part and becomes an independent political subdivision, except as to certain joint services specified in Code, § 15.104 [now § 15.1-1005].

Schools are not listed among the services specified in § 15.1-1005—that section is limited to the sharing of the circuit court, commonwealth's attorney, clerk and sheriff.

B.

EMPORIA BECAME A CITY PURSUANT TO LONG EXISTING STATE LAW

The present Code of Virginia provides that a town upon attaining a population of 5,000 may elect to become a city of the second class by following the procedure set forth in the Code. Title 15.1, ch. 22, *Va. Code Ann.* 1950, as amended. The law has been substantially the same since at least 1892. *Acts of the Assembly*, 1891-1892, ch. 595, at 934.

Thus it is clear that the provisions under which the Town of Emporia acted to become a city have long been a part of

the law of Virginia and were not enacted in any way as the result of the school desegregation suits or for any other racial reason.

C.

CITIES IN VIRGINIA HAVE THE RIGHT AND DUTY TO OPERATE AND MAINTAIN OWN SCHOOL SYSTEMS

On July 31, 1971, a rather extensive revision of the Constitution of Virginia became effective. Conforming revisions to the statutes of Virginia likewise became effective on that same date. The argument that follows in this section is applicable under the constitution and statutes both before and after the revision.

The Constitution of Virginia has, since 1928, vested the supervision of county schools in the county school boards and the supervision of city schools in the city school boards. Section 133 of the Constitution of Virginia (RA 1), which was in effect at the time this case was tried,¹⁶ provides, in part, as follows:

The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law.

Since at least 1919 the Code of Virginia has affirmatively required the city school boards to establish and maintain a

¹⁶ Pertinent portions of the Constitution as revised are set forth at RA 2.

Many of the sections of the Code of Virginia which are set out in the appendix to the Brief for Petitioners have been amended or repealed. The sections, as amended, are set forth at RA 2, 3 and 7.

Under the law of Virginia at the time this case was tried and at the present time, it was and is not possible to have a single school board for a county and a city without the consent of both and of the State Board.

system of schools in cities. Section 22-93, *Va. Code Ann.*, 1950, as amended (RA 3), provides:

The city school board of every city shall establish and maintain therein a general system of public free schools in accordance with the requirements of the Constitution and the general educational policy of the Commonwealth.

This language was also contained in the Code of 1919, § 786.

Section 22-97, *Va. Code Ann.*, 1950, as amended (RA 3, *et seq.*), enumerates the powers and duties of the city school boards.

Thus, the law in Virginia for many years has not only permitted but required city school boards to establish and maintain city schools.

The petitioners have recognized that the local school boards are required to "establish, maintain, control and supervise an efficient system of public free schools" in the political subdivisions of the State. See paragraph 7 of the Complaint filed on March 12, 1965 (5a).

The Supreme Court of Virginia has spoken directly to the duty of a city to maintain its own school system after a transition. In *School Board v. School Board*, 197 Va. 845 (1956), dealing with the transition of the Town of Covington to a city, the court stated at 847:

As a town, Covington was a part of Alleghany County whose public schools were operated by the County School Board. When Covington became a city it ceased to be a part of the county, became a completely independent governmental subdivision, and was required by law to maintain its own public school system (emphasis supplied).

The evidence shows that under the contract arrangement between Greensville County and the City of Emporia, which was in existence when the case was tried in the District Court, the School Board of the City of Emporia was not exercising or fulfilling any of these powers and duties (158a, 159a, 242a).

If the City is further restrained from operating its own system, an intolerable situation will be perpetuated. Children of City residents will be required to attend a school system over which the City has *absolutely no control*. The City will have no right to participate in the selection of the members of the County School Board and thus will have no voice in the quality of the schools that are provided. It will have no right to participate in the selection of the governing body of the County and thus will have no voice in the amount of money appropriated for school purposes.

On the other hand, the County will be required to continue educating the City's children. Absent agreement between the City and County, there is no definitive provision for establishing the amount that City should pay to the County for this service. If no such agreement could be reached—and with the situation as it exists, it is doubtful that it could—the question would inevitably be presented to the courts. Any order requiring the City to pay a certain amount to the County would, in effect, be an order requiring the governing body of the City to levy taxes and appropriate a fixed sum to pay to the County for the operation of its school system—a school system over which the City has no control whatsoever.

On page 45 of their brief, in footnote 26, petitioners suggest a solution: they suggest that the District Court "could modify the requirements of state law concerning representation." They do not elaborate on this plan. Do they envision

court-ordered representation of the City on the school board only? This would accomplish nothing since the power of the purse lies solely with the governing body of the County. Or do they suggest court-ordered representation of the City on the governing body of the County? The statement of the question alone illustrates the problems—constitutional, statutory and practical—which would inevitably follow.

If petitioners' suggestion were followed to its logical conclusion, district courts would find themselves making legislative determinations involving every level of state government. They would be required to determine the manner in which local government in Virginia must be structured, the manner of providing representation on the governing bodies and school boards of the local units of government, and the manner in which the taxing powers of those units must be exercised.

We do not believe that the operation by Emporia of its own school system as provided for by Virginia law violates any constitutional right of petitioners. And we submit that the fact that the structure of local government in Virginia was established under long-existing constitutional and statutory provisions is a consideration upon which this Court should focus in deciding this question.

II

Operation by the City of Its Own School System Would Violate no Constitutional Rights of Petitioners

A.

PETITIONERS' RIGHTS

Petitioners' rights in this case are grounded upon the mandate contained in the Fourteenth Amendment to the Constitution of the United States that:

No state . . . shall deny any person within its jurisdiction the equal protection of the laws.

Between the date of the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and the present time, literally hundreds of cases have been decided dealing with the scope of this constitutional mandate as applied to the public school systems of the several states. Nevertheless, it is well to focus on the language of the basic provision of the Constitution which establishes the rights of the petitioners on the one hand and the duties of the respondents on the other.

In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), and in *Alexander v. Holmes County Board of Educ.*, 396 U.S. 19, (1969), this Court has made its most recent pronouncements with respect to the substantive constitutional rights of Negro children and the corresponding duties of local school boards.

In *Green*, the Court stated that it had held dual systems unconstitutional in *Brown I* and that the school boards were "required by *Brown II* 'to effectuate a transition to a racially non-discriminatory school system'." 391 U.S. at 435.

The Court then said:

[T]he transition to a unitary, non-racial system of public education was and is the ultimate end to be brought about . . . (emphasis supplied).

391 U.S. at 436.

The Court continued:

School boards . . . were . . . charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch . . .

The constitutional rights of Negro children articulated in *Brown I* permit no less than this . . .

391 U.S. at 437, 438.

In *Holmes*, this Court instructed the Court of Appeals to declare:

that each of the school districts here involved may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color.

396 U.S. at 21.

In *Swann*, this Court did not expand its previous definition of the rights of Negro children but rather dealt with the duties of school authorities and the powers of district courts to assure that such rights were enjoyed. The objective of the Court was "to see that school authorities exclude no pupils of a racial minority from any school, directly or indirectly, on account of race." *Swann*, 402 U.S. at 23. (It is to be noted that in the instant case, petitioners are in the racial majority.)

Therefore, based upon the foregoing decisions, the petitioners have the constitutional right to attend a unitary, non-racial school system, and the local school boards have the affirmative duty to provide such a system. It is submitted that while the petitioners can expect no less, they can demand no more. Such a system is "the ultimate end," (*Green*, 391 U.S. at 436) to be attained and, if attained, provides the rights to which petitioners are entitled and fulfills the duties for which the respondents are responsible.

This Court has also held that Negro children have no constitutional right to any particular plan to accomplish the

ultimate end of a racially unitary system. If the plan of the local school authorities has been adopted in good faith and "promises realistically to work *now*," then it provides effective relief. *Green*, 391 U.S. at 439. And school authorities "have broad power to formulate and implement educational policy" *Swann*, 402 U.S. at 16.

Of course, the right to a unitary, nonracial school system cannot be nullified "through evasive schemes for segregation whether attempted 'ingeniously or ingenuously'." *Cooper v. Aaron*, 358 U.S. 1 (1958) at 17. By the same token, the rights and duties of local school authorities to operate and maintain school systems as provided for by the constitution and laws of the state cannot be nullified by insistence upon a particular method of achieving a unitary system.

It is only when the violation of a constitutional right has been shown that the remedial powers of the courts may be exercised. In *Swann*, this Court stated:

In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

402 U.S. at 16.

Here, the City has not defaulted and its proposed action will not violate any of petitioners' constitutional rights. Thus it is not necessary, nor is it proper, to consider the scope of the district court's remedial power. Where there has been no denial of a federally protected right, there is no remedial power to be exercised.

B.

PROPOSED ACTION OF THE CITY

The School Board of the City of Emporia has adopted a plan pursuant to which it will operate a racially unitary school system if permitted so to do by the courts. This plan is set forth in footnote 12 on page 14 of this brief and on page 224a of the Appendix.

The evidence shows that such a system operated by the City will have approximately 48 percent white students and 52 percent Negro students (304a).

The uncontradicted evidence showed that the City has taken steps to plan a school system of excellence that would provide incentives for all its children to obtain an education in a truly unitary system. The District Court so found (297a). It was envisioned that this system would serve as an example of what can be done by school officials dedicated to making a unitary system work—not just in name and numbers, but in actual fact.

The School Board engaged the services of a well-known educator who assisted it in making preliminary plans for the type of program that would be required to meet the educational and social challenges of a system that has a 50-50 racial mix and to hold the children who might otherwise drop out of the system before completing their education (202a, *et seq.* espec. 212a). An estimated budget for the operation of such a system was prepared and approved by the unanimous vote of the School Board (200a). Further, the City Council agreed to include the necessary funds to finance such a system in the next budget (287a). Of course, the actions of the School Board and Council were necessarily conditioned upon the dissolution of the injunction entered by the District Court.

Every step that could practicably be taken to plan such a system consistent with the restraints imposed by the District Court was taken. The plans were more than mere abstract expressions of individuals relating to goals to be sought. Formal approval to the extent now possible of workable plans and the estimated budget by the respective Boards are a matter of record. If those plans violate no constitutional rights of petitioners, then the Council and School Board of the City of Emporia should be permitted to proceed to put them into effect.

C.

PETITIONERS' RIGHTS WILL NOT BE VIOLATED BY THE PROPOSED ACTION OF THE CITY

It is obvious that the separate systems—City and County—will each be racially unitary in law and in fact. No student in the City and no student in the County—whether of the racial majority (Negro) or minority (white)—will be excluded from any school on account of race. The District Court held that it “was satisfied that the City, if permitted will operate its own system on a unitary basis” (307a). It previously entered an order that assures such a system will be operated in Greensville County (54a) regardless of the outcome of this case.

In footnote 21, on pages 32 and 33 of their brief, petitioners complain that under the City's plan the traditional racial identities of the schools would be maintained. This is just not true. For two and one-half years, the County system has been operated under the “pairing” plan approved by the District Court on June 25, 1969 and presumably it would continue to operate under such a plan. Under the City's proposal, each of the two schools it will operate will be fully integrated—one with a slight majority of Negro students,

the other with a slight majority of white students (316a). And one of those schools will be named the R. R. Moton Elementary School (225a).

Therefore, it is only if the separation itself, which came about as an automatic and incidental result of the town's transition to city status, deprives petitioners of their constitutional rights that the City should be prohibited from operating its own system as every other city in Virginia is permitted to do.

Petitioners base their argument and their case on an assumption. They *assume* the deprivation of a constitutional right. They do not ever attempt to point out the constitutional right they claim would be violated. Their argument speaks only to the remedial powers of the District Court which, as we have previously noted, can only be applied after a violation of a constitutional right has been shown. *Swann, supra*, 402 U.S. at 16. Thus, petitioners attempt to pull themselves up by their own bootstraps—they argue the abstract principles with respect to remedy without ever establishing a violation.

To put the issue here involved into perspective it is necessary to examine the reasoning of the District Court and of the dissenting judge (Judge Winter) on the Court of Appeals in holding that the City should be restrained. Only in that way can the applicable law be related to the facts in this argument. In their Statement, petitioners set forth the following "difficulties" which the District Court found would arise upon separation (PB 21, 22):

1. substantial shift in racial balance,
2. a city high school of less than optimum size,
3. isolation of rural county students from exposure to urban society,
4. disruption of teaching staff, and

5. withdrawal of city leadership from the county's educational program.

Further, they set forth the factors mentioned by Judge Winter which would make the separate system plan "less effective" than the District Court order. In summary, these factors were stated to be (PB 27):

1. delay which would be occasioned by adoption of new plans,
2. substantial change in racial proportions, and
3. the effect on county black students of the excision from their system of a significant part of the white population.

With the exception of the so-called "substantial shift" in racial balance, all of the aforementioned "difficulties" and factors would be present even if the racial balance in the separate systems had remained precisely the same as it was before separation. And almost all of them would be present had the systems historically been separate.

We submit that none of such difficulties or factors—even if they in fact exist, which we deny—constitutes a violation of any constitutional right of petitioners. We again point out that the District Court was not convinced that any adverse effects *would* result from the separation. It stated that even though the City would operate systems with "superior quality" (297a) on a "unitary basis" (307a), that

[But] this does not exclude the *possibility* that the act of division itself *might* have foreseeable consequences that this Court ought not to permit" (emphasis supplied) (307a).

And:

This Court is most concerned about the *possible* adverse impact of secession on the effort, under Court di-

rection, to provide a unitary system to the entire class of plaintiffs" (emphasis supplied), (308a).

It is clear that the primary factor upon which the District Court based its decision, upon which Judge Winter based his dissent and upon which petitioners base their case is the shift in racial balance that will occur. We will address that issue now.

Shift in racial balance

The facts with respect to racial balance are:

Combined system	66% black; 34% white
Separate systems	
County	72% black; 28% white
City	52% black; 48% white

These are the facts found by the District Court and adopted by the Court of Appeals (304a, 316a). Whether or not such a shift of such ratios constitutes the violation of a constitutional right is not a question of fact—rather it is a conclusion drawn from the facts. It is certainly within the powers of courts of appeals to reverse district courts on such a matter. *Glassman Construction Company v. United States*, 421 F. 2d 212 (4th Cir. 1970). Actually, the District Court did not ever specifically hold that the shift did constitute a violation of constitutional rights.

In any event, we submit that a six percent increase in Negro enrollment and a six percent decrease in white enrollment cannot reasonably be deemed a "substantial shift." Such a minor change of proportions could result in any year for a variety of reasons and could not be deemed to alter the character of the County system. Before and after such a shift, the County system would be fully integrated with an approximate two to one Negro to white ratio.

We submit that there is no evidence in the record to indicate that such a slight shift would actually result in any harm to county students. However, assuming *arguendo*, that harm would result from this slight change in the racial balance, per se, is it the type of harm against which the Constitution of the United States provides protection? The City submits that it is not. It does not result from the deprivation by the City of any constitutional rights of the petitioners.

In *Swann*, 402 U.S. at 24, this Court made it crystal clear that there is no requirement "as a matter of substantive constitutional right, [to] any particular degree of racial balance or mixing." It continued:

The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole

402 U.S. at 24.

While local school authorities could require such ratios, federal courts do not have the power to do so absent a finding of constitutional violation. *Swann*, 402 U.S. at 16.

Analysis of the cases cited by petitioners discloses that they are readily distinguishable from the Fourth Circuit's decision in this case. It is probable that had those cases been before the Fourth Circuit, its decision would have been the same as in the cited cases.

In *Lee v. Macon County Bd. of Educ.*, No. 30154 (5th Cir., June 29, 1971) (SA 1a), Oxford City, Alabama, attempted to establish its own school system independent of Calhoun County of which it is a part. Apparently, Oxford had been a city since at least 1899 (SA 4a) but had been a part of the county school system since 1932. Though Oxford was a city, it is assumed that it was not completely inde-

pendent of the county since Virginia is the only state in the United States in which the unique structure of independent cities uniformly exists.¹⁷

More importantly, however, the Oxford system would have contained only 157 Negro students out of a total enrollment of 2,441 (SA 10a, fn. 10). At the same time, approximately 45% of all the black students in the county system would attend all black or virtually all black schools (SA 13a). Thus, the effect of the Oxford plan is to perpetuate segregation.

In *Stout v. Jefferson County Bd. of Educ.*, 448 F2d 403 (5th Cir. 1971), also arising from Alabama, it was held that

"Where the formulation of splinter school districts * * * have the effect of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of *Swann v. Charlotte-Mecklenburg*, *supra*, recognize their creation" (emphasis supplied).

448 F2d at 404.

Involved in that case was the city of Pleasant Grove in the schools of which were no Negroes.¹⁸ Again the effect of the Pleasant Grove system was to perpetuate segregation.

¹⁷ C. Bain, "A Body Incorporate"—*The Evolution of City-County Separation in Virginia* ix, 23, 27, 35 (1967); C. Adrian, *State and Local Governments*, 249 (2d ed. 1967).

¹⁸ Support for this statement comes from the following quotation in *Stout v. Jefferson County Bd. of Educ.*, CA No. 65-396 (N.D. Ala., July 30, 1970), which is unreported:

To date, the Pleasant Grove System has remained all white, but students attending the Pleasant Grove school are attending the school nearest their residence whether Pleasant Grove remains separate or a part of the County System. To date, they have no black faculty members, but have offered employment to black teachers and are seeking to recruit some teacher members of that race. The system is open and available for all members of all races residing within the City of Pleasant Grove without discrimination. There are no black citizens within the city.

In *Burleson v. County Bd. of Election Com'rs.*, 308 F. Supp. 352 (E.D. Ark. 1970), *affd per curiam* 432 F. 2d 1356 (8th Cir. 1970), the question was whether the Hardin Area of the Dollarway School District of Jefferson County, Arkansas, would be permitted to secede from that particular district and establish a new district *within* the same county. Apparently, in addition to the county board of education, each school district had its own "board of directors." For all purposes other than schools, it is again assumed that the Hardin Area would remain a part of Jefferson County.

In the *Burleson* case the district court found:

The population of the Area is almost exclusively white. In the fall of 1969 270 students residing in the Area were in attendance in the schools of the District, and only 5 of those students were Negroes.

308 F. Supp. at 353.

The Court went on to hold that under the "existing circumstances" the proposed secession would be enjoined. 308 F. Supp. at 358.

In *Aytch v. Mitchell*, 320 F. Supp. 1372 (E.D. Ark. 1971), a suburban area was seeking a division of one school district into two separate districts. Had this been permitted the suburban district would have had a racial ratio of 94% white to 6% black and the other district, a ratio of 96% black to 4% white. Obviously, no valid comparison can be drawn between *Aytch* and this case.

Petitioners cite *Jenkins v. Township of Morris School Dist.*, A. 2d (N.J. 1971) (SA 25a) for the proposition that the Commissioner of Education for the state had the power to cause district lines to be crossed. This is far different from a decision that the constitutional rights of Negro students require such a result.

Haney v. County Bd. of Educ. of Sevier County, 410 F. 2d 920 (8th Cir. 1969) involved two school districts within one county that were formed at a time when segregation was required by state law. The Lockesburg district contained white children only. The Sevier district, which consisted of two noncontiguous, irregularly shaped areas each of which was almost entirely surrounded by the Lockesburg district, contained Negro children only. The court there held as a matter of law that the school district lines were created to reflect racial separation—gerrymandering. 410 F. 2d at 926.

Each case cited by the petitioners in which the court has prohibited separation involved a situation in which the effect of such separation would have been to avoid a racially unitary school system as a matter of fact. Under the facts of those cases, we suggest that the Fourth Circuit would likewise have prohibited the separation.

Not cited by petitioners is *Spencer v. Kugler*, 326 F. Supp. 1235 (D.C. N.J., May 13, 1971) which was decided by a three-judge district court. The case is now on appeal to this Court and bears Docket No. 71-519. That case involves the duty of school authorities to redraw school district lines in order to correct racial imbalance. In that case, as in the instant case, no black pupil is segregated from any white pupil, blacks in the school district predominate over white (326 F. Supp. at 1239), school boundaries were prescribed by the legislature in conformity with municipal boundaries and considerations of race were not involved in the drawing of the lines. 326 F. Supp. at 1240. Further, plaintiffs in that case, as in this, do not disclose the particulars of the constitutional violations which they assume. 326 F. Supp. at 1240.

The Court held that the school system was unitary in nature and any imbalance within a district results from an

imbalance in the population of that municipality. 326 F. Supp. at 1240. After holding that *Brown v. Board of Education, supra*, "never required more than a unitary school system," the Court dismissed the complaint. 326 F. Supp. at 1241. The Court pointed out that its opinion was drafted prior to the *Swann* decision, but that it considered *Swann* to be a favorable appellate review of its views. 326 F. Supp. at 1241.

Factors other than shift in racial balance

None of the other factors which petitioners set forth as having been considered by the District Court and by Judge Winter in his dissent can possibly give rise to a constitutional violation. They are factors which a school board should consider in the administration of its system. They are not constitutional problems which should be weighed and determined by the federal judiciary. *Deal v. Cincinnati Board of Educ.*, 369 F. 2d 55 at 59, 65 (6th Cir. 1966), *cert. denied* 389 U.S. 847 (1967). If the racial balance in the City and the County would have been precisely the same before and after separation, we suggest that a case based upon the other factors would not have ever been filed.

The District Court mentioned as difficulties that, "the smaller city system would not allow a high school of optimum size" and that "division of the existing system would cut off county pupils from exposure to a somewhat more urban society" (306a). It also found that many of the teachers live in the City and that a separate system "would undoubtedly have some effect on the teaching staffs" even though the City represented it would not seek to hire such teachers (307a). Petitioners state that the District Court also found the "withdrawal of city leadership from the

county's educational program" to be a difficulty (PB 22). We cannot locate such a finding unless it be the statement that the desire and ability of City leaders will be an important facet in the successful operation of any court-ordered plan (306a).

We submit that the size of the City high school; the questionable conclusion that County students would be cut off from a somewhat more urban society;¹⁹ some unspecified effect on teaching staffs; and loss of leadership, which the City, in fact, is precluded from providing, are not factors which give rise to constitutional rights. If they were, then *all* residents of a state would be constitutionally entitled to optimum size schools, to urban exposure, and to the leadership which might be derived from adjacent political subdivisions.

Judge Winter added two other reasons: the delay which would have been occasioned by the adoption of the new plans (339a) and the "adverse psychological effects on the black children in the county" (340a). If the delay which Judge Winter believed would occur referred to the situation in August 1969, it, of course, would not have been a factor in December 1969 since the City did not plan to begin operation of its own system until September 1970 (200a). Further, the plan submitted by the City (224a) was very simple and would not have caused delay in implementation. Lastly, if the City has the right to operate its own system, any slight delay that possibly might occur would not be a constitutional obstacle.

There was absolutely no evidence to support Judge Winter's conclusion that the shift in racial balance of 6% would have an "adverse psychological" effect on the Negro students in the County with any resultant effect on educational

¹⁹ It is to be noted that the District Court did not find this to be detrimental.

achievement. In fact, Dr. Tracey testified that he spent some time in ascertaining whether any studies were available on that question and that no such study had been made (281a):

D.

PROPOSED ACTION OF CITY MEETS ANY CONSTITUTIONAL TEST TO WHICH IT MAY FAIRLY BE SUBJECTED

Petitioners assert that the opinion of the Fourth Circuit announces a new rule for school desegregation cases, which, according to petitioners, involves the determination of the "primary *motive*" of those proposing a change in school district organization (PB 37). Only once in that opinion is "motivation" mentioned and that was in connection with the decision of Emporia to seek city status (314a). Even there, the Court found the motivation to have been to correct an unfair allocation of tax revenues and *not* to prevent or diminish integration. The Fourth Circuit did examine the "purpose" of the City in attempting to operate its separate system and it must be assumed that it chose the word "purpose" advisedly. Likewise, it is assumed that the petitioners elected to use the word "motive" advisedly, in stating what the Court of Appeals said, rather than using that Court's word. Be that as it may, in our view, as we will later explain, it makes little difference in this case which word is used.

Petitioners argue that the "effect" of the proposed action should be controlling rather than the motive behind that action. We agree. And so did the Court of Appeals. Petitioners, in their argument, ignore completely that the Fourth

Circuit was vitally concerned with the effect or result of the separation.²⁰

The effect or result of the proposed separation was the first matter examined by the Court. Had it found that the effect of separation would be to perpetuate segregation or to result in resegregation, its inquiry would have ended and the District Court would have been affirmed. However, when it specifically found that the proposed separation would not have that effect, the Fourth Circuit held that further inquiry was necessary to determine the dominant or primary "purpose" of the proposed action. If the purpose was to "further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation," it held that "the federal courts should not interfere" (313a). If, however, the primary purpose was to "retain as much of separation of the races as possible" the "affirmative constitutional duty to end state supported school segregation" has been violated (313a).

The test applied by the Fourth Circuit is more generous to petitioners than any test which they suggest. It cannot be disputed that the effect of establishing the City's School System will be that Greenville County and the City of Emporia each will operate racially "unitary school systems with-

²⁰ On page 25 of their brief in the Statement section, petitioners write:

In general, therefore, the Court holds that the permissibility of creating new districts from old ones depends upon whether the "primary purpose . . . is to retain as much of separation of the races as is possible" (313a). Where the *result* justifies an inference of purpose, that is the end of the matter. Where it does not, the courts are to look to other evidence in forming their judgment of the "primary purpose" for establishing new districts (emphasis supplied).

Thereafter, they overlook their own statement with respect to the basis of the decision of the Fourth Circuit and proceed as if "motive" were the sole test applied by that Court.

in which no person is to be effectively excluded from any school because of race or color," *Holmes*, 396 U.S. at 20, and from which "school authorities exclude no pupil of a racial minority [or majority] from any school, directly or indirectly, on account of race." *Swann*, 402 U.S. at 23. In both systems, Negro children will be in the majority just as they were in the combined system. In the County that majority will be increased by only 6 percent as a result of the separation (316a). There is no evidence of any resultant harm to the petitioners who reside in the County—certainly none of a constitutional nature. On the other hand, the Negro children who live in the City—for whom those prosecuting this litigation appear to have no regard—will not only be able to attend a racially unitary system but also a system in which a superior quality educational program geared to solve the problems of integration will be provided. The District Court so found (297a, 306a, 307a).

Thus, we submit that the Fourth Circuit did consider "effect" to be of vital importance. It considered "effect" as the primary test in determining the purpose of the separation. And purpose is a proper—perhaps necessary—inquiry in equal protection cases which involve whether a challenged classification is unconstitutional. (It is on this point that the distinction between purpose and motive is important. The former is an objective determination; the latter, a subjective one.) See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969) at 1091.

The Fourth Circuit went *beyond* "effect" in its determination of purpose:

Not only does the *effect* of separation not demonstrate that the primary purpose of the separation was to perpetuate segregation, but there is strong evidence to the contrary. Indeed, the district court found that

Emporia officials had other purposes in mind (emphasis supplied) (316a).

The Court then reviewed the findings of the District Court that we have set out previously in this brief.

Having decided that no discriminatory effect or purpose existed or would result, which decision was based upon the District Court's findings of fact, the Fourth Circuit held that the injunction would sacrifice legitimate and benign educational improvement and should be dissolved (318a).

In the lone dissent to the opinion of the Fourth Circuit, Judge Winter expressed the opinion that the standard to be applied was established in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) (336a). The proposed plan of the City, we submit, meets that standard.

It was, in *Green* that this Court said that "a unitary, non-racial system of public education was and is the ultimate end to be brought about. . . ." 391 U.S. at 436.

It was in *Green* that this Court said that there is "no universal answer" to the problems of desegregation and that there is "no one plan that will do the job." 391 U.S. at 439.

It is only when the proposed plan is "less effective" than another plan that "a heavy burden" is placed upon a school board to explain its preference. *Green*, 391 U.S. at 439.

First, we submit that the proposed plan is not less effective than the one urged by petitioners. On the contrary, it is more effective. Second, even if it were less effective, the City has carried the heavy burden of showing why it is preferable.

Judge Winter attaches crucial significance to the fact that the percentage of white students in the City would be substantially greater than it would have been in the combined system. He said:

Within the entire county, there are 3,759 students in a racial ratio of 34.1% white and 65.9% black. Within

the city there are 1,123 students, 48.3% of whom are white and 51.7% are black. If the city is permitted to establish its own school system, the racial ratio in the remainder of the county will change to 27.8% white and 72.2% black. To me the crucial element in this shift is not that the 48.3%-51.7% white to black ratio in the town *does not constitute the town a white island in an otherwise heavily black county and that a shift of 6% in the percentage of black students remaining in the county is not unacceptably large*. Whenever a school area in which racial separation has been a historical fact is subdivided, one must compare the racial balance in the preexisting unit with that in the new unit sought to be created, and that remaining in the preexisting unit after the new unit's creation. A substantial shift in any comparable balances should be cause for deep concern. In this case the white racial percentage in the new unit will increase from 27.8% to 48.3%.²¹ To allow the creation of a substantially whiter haven in the midst of a small and heavily black area is a step backward in the integration process (emphasis supplied) (339a, 340a).

Thus, Judge Winter agrees with the majority that Emporia would not be a white island and that the 6% shift in the percentage of black students remaining in the County is not unacceptably large. That being so, what possible injustice would result from the fact that the percentage of white students in the City system would be greater than that percentage would have been in the combined system—in either case, white students will be in the racial minority. The only logical explanation seems to be that Judge Winter believes that a particular racial balance is required by the Con-

²¹ Judge Winter apparently misread the figures. Actually, the white racial percentage would increase from 34% in the combined unit to 48% in the City unit.

stitution. This Court has made it clear that this is not the law. *Swann*, 402 U.S. at 24.

The standards proposed by Judge Sobeloff in *United States v. Scotland Neck City Board of Education*, 442 F. 2d 575 (4th Cir. 1971) are preferred by petitioners (PB 43). He suggests a "compelling and overriding state interest" test (322a, *et seq.*).

He states it as follows:

If challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding legitimate state interest is demonstrated (322a).

Since Judge Sobeloff did not participate in the *Emporia* case, we of course do not know how he would have applied that standard in it. In *Scotland Neck*, he stated that the effect of the new school district was to "create a sanctuary for white students" (334a) and was therefore discriminatory.

We submit that the proposed action by the City of Emporia would have no such effect. The City, as Judge Winter agreed (340a), will by no means be a "sanctuary" for white students for they will be in the racial minority. Even if the fact that white students will constitute 48% of the City system, as compared to 34% of the total system, would have a racially discriminatory effect, which we deny, we submit that it should be permitted under Judge Sobeloff's own test. The objective of the City to provide a superior quality, racially unitary school system of its own, as every other city in the state is permitted to do, constitutes a compelling and overriding legitimate state interest. The majority in the *Emporia* case so held:.

We think the district court's injunction * * * was improvidently entered and unnecessarily sacrifices legitimate and benign educational improvement (318a).

Petitioners have made it clear that they do not believe "motive" to be controlling. As heretofore stated, we agree. We have pointed out that the majority did not base its decision upon motive. Judge Winter alone would have no objection to consideration of motive.²²

This Court has recently stated that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Palmer v. Thompson*, 403 U.S. 217, 29 L. Ed. 2d 438 (1971) at 444.

It is true, however, that "the process of finding purpose and that of finding motive may overlap"²³ and we suggest that the record in this case indicates that the *purpose* of the proposed action by Emporia is identical with the motives of the officials who made the decision. Certainly, "good faith," while not determinative, is a factor to be considered. *Green*, 291 U.S. at 439; *Brown v. Board of Educ.*, 349 U.S.

²² Judge Winter said:

In an area in which historically there was a dual system of schools and at best grudging compliance with *Brown*, we cannot be too careful to search out and to quash devices, artifices and techniques furthered to avoid and to postpone full compliance with *Brown*. We must be assiduous in detecting racial bias masking under the guise of quality education or any other benevolent purpose. Especially must we be alert to ferret out the establishment of a white haven, or a relatively white haven, in an area in which the transition from racially identifiable schools to a unitary system has proceeded slowly and largely unwillingly, where its purpose is at least in part to be a white haven. Once a unitary system has been established and accepted, greater latitude in redefinition of school districts may then be permitted (338a).

²³ *Developments in the Law—Equal Protection*, *supra*, 82 Harv. L. Rev. at 1092.

294 (1955) at 299 (*Brown II*). And whether the determination of "good faith" is one of purpose or motive, the record here establishes the good faith of Emporia. The decision of the Fourth Circuit, which was based upon the District Court's findings of fact, so holds.

There is no evidence in the record which would indicate that the motive of the City officials was to perpetuate segregation or to minimize integration. The only consideration given to race was the realization that special effort would be required to make a unitary system actually work (307a). Emporia then determined that it wanted to and would provide that effort. Therefore, we submit that the "affirmative duty to desegregate has been accomplished" and that "racial discrimination through official action has been eliminated from the system." *Swann*, 402 U.S. at 32. Since there has been no

"showing that the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."

Swann, 402 U.S. at 32.

CONCLUSION

The District Court enjoined the City from operating its own school system. In so doing, it disregarded the beneficial effects that would inure to the children—Negro and white—of the City. If the injunction were reinstated, excellence of education for the City children would be sacrificed. Emporia, an independent city, would be denied the opportunity to establish a quality educational program in a unitary system in order that a particular racial balance in the system of

an adjoining independent county would not be disturbed. The Constitution does not require this. So long as petitioners may attend a racially unitary system, their constitutional rights have been fulfilled and the constitutional duties of the School Board have been performed.

For the reasons herein stated, the City respectfully submits that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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VIRGINIA CONSTITUTION

Va. Const. Art. IX, § 133. *School districts; school trustees.*

—The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Each magisterial district shall constitute a separate school district, unless otherwise provided by law, and the magisterial district shall be the basis of representation on the school board of such county or city, unless some other basis is provided by the General Assembly; provided, however, that in cities of one hundred and fifty thousand or over, the school boards of respective cities shall have power, subject to the approval of the local legislative bodies of said cities, to prescribe the number and boundaries of the school districts.

The General Assembly may provide for the consolidation, into one school division, of one or more counties or cities with one or more counties or cities. The supervision of schools in any such school division may be vested in a single school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Upon the formation of any such school board for any such school division, the school boards of the counties or cities in the school division shall cease to exist.

There shall be appointed by the school board or boards of each school division, one division superintendent of schools, who shall be selected from a list of eligibles certified by the State Board of Education and shall hold office for four years. In the event that the local board or boards fail to elect a division superintendent within the time prescribed by law, the State Board of Education shall appoint such division superintendent.

* * *

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Va. Const. (Revised) Art. VIII, § 5. *Powers and duties of the Board of Education.*—The powers and duties of the Board of Education shall be as follows:

(a) Subject to such criteria and conditions as the General Assembly may prescribe, the Board shall divide the Commonwealth into school divisions of such geographical area and school-age population as will promote the realization of the prescribed standards of quality, and shall periodically review the adequacy of existing school divisions for this purpose.

* * *

Va. Const. (Revised) Art. VIII, § 7. *School boards.*—The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.

* * *

VA. CODE ANN. (1950)

§ 15.1-982: *Result of census; order.*—If it shall appear to the satisfaction of the court, or the judge thereof in vacation, from such enumeration that such incorporated community has a population of five thousand or more, such court or judge shall thereupon enter an order declaring that fact to exist and thereafter such incorporated community shall be known as a city and entitled to all the privileges and immunities and subject to all the responsibilities and obligations pertaining to cities of this Commonwealth. . . .

§ 22-30. *How division made.*—Until the first day of the fourth month following adjournment of the session of the General Assembly to which is submitted the report of a legislative study recommending criteria and conditions to be

prescribed by the General Assembly under § 5 (a) of Article VIII of the Constitution, the Board of Education, in dividing the Commonwealth into school divisions, shall be governed by the following criteria and conditions:

(1) No school division shall be composed of more than one county or city;

(2) No school division shall be composed of a county or city and any one of the following towns: Abington, Cape Charles, Colonial Beach, Fries, Poquoson, Saltville, or West Point.

Notwithstanding any of the above criteria and conditions, the Board of Education may, upon the request of the school boards of the counties, cities, and towns affected, concurred in by the governing bodies thereof, consolidate or otherwise alter school divisions.

§ 22-43. *Special districts continued.*—Special town school districts which now exist for the purposes of representation on division school boards shall continue.

§ 22-93. *Establishment of public free school system.*—The city school board of every city shall establish and maintain therein a general system of public free schools in accordance with the requirements of the Constitution and the general educational policy of the Commonwealth.

§ 22-97. *Enumeration of powers and duties.*—The city school board shall have the following powers and duties:

(1) *Rules and regulations.*—To explain, enforce, and observe the school laws, and to make rules for the government of the schools, and for regulating the conduct of pupils going to and returning therefrom.

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(2) *Method of teaching and government employed.*—To determine the studies to be pursued, the methods of teaching, the government to be employed in the schools, and the length of the school term.

(3) *Employment and control of teachers.*—To employ teachers on recommendation of the division superintendent and to dismiss them when delinquent, inefficient or in anywise unworthy of the position; provided, that no school board shall employ or pay any teacher from the public funds unless the teacher shall hold a certificate in full force, according to the provisions of §§ 22-203 to 22-206. It shall also be unlawful for the school board of any city, or any town constituting a separate school district, to employ or pay any teacher or other school employee related by consanguinity or affinity as provided in § 22-206. The exceptions and other provisions of that section shall apply to this section.

(4) *Suspension or expulsion of pupils.*—To suspend or expel pupils when the prosperity and efficiency of the school make it necessary.

(5) *Free textbooks.*—To decide what children, wishing to enter the schools of the city, are entitled to receive textbooks free of charge and to provide for supplying them accordingly.

(6) *Establishment of high and normal schools.*—To establish high and normal schools and such other schools as may, in its judgment, be necessary to the completeness and efficiency of the school system.

(7) *Census.*—To see that the census of children required in § 22-223 is taken within the proper time and in the proper manner.

(8) *Meetings of boards.*—To hold regular meetings and to prescribe when and how special meetings may be called.

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(9) *Meetings of people.*—To call meetings of the people of the city for consultation in regard to the school interests thereof, at which meetings the chairman of some other member of the board shall preside if present.

(10) *Schoolhouses and property.*—To provide suitable schoolhouses, with proper furniture and appliances, and to care for, manage, and control the school property of the city. For these purposes it may lease, purchase, or build such houses according to the exigencies of the city and the means at its disposal. No schoolhouse shall be contracted for or erected until the plans therefor shall have been submitted to and approved in writing by the division superintendent of schools, and no public school shall be allowed in any building which is not in such condition and provided with such conveniences as are required by a due regard for decency and health; and when a schoolhouse appears to the division superintendent of schools to be unfit for occupancy, it shall be his duty to condemn the same, and immediately to give notice thereof, in writing, to the chairman of the school board, and thenceforth no public school shall be held therein, nor shall any part of the State or city fund be applied to support any school in such house until the division superintendent shall certify, in writing, to the city school board that he is satisfied with the condition of such building, and with the appliances pertaining thereto.

(11) *Visiting schools.*—To visit the public free schools within the city, from time to time, and to take care that they are conducted according to law, and with the utmost efficiency.

(12) *Management and control of funds.*—To manage and control the funds of the city made available to the school board for public schools, to provide for the pay of teachers

and of the clerk of the board, for the cost of providing school-houses and the appurtenances thereto and the repairs thereof, for school furniture and appliances, for necessary textbooks for children attending the public free schools whose parent or guardian is financially unable to furnish them; and for any other expenses attending the administration of the public free school system, so far as the same is under the control or at the charge of the school officers.

(13) *Approval and payment of claims.*—* * *

(14) *Report of expenditures and estimate of necessary funds.*—It shall be the duty of the school board of every city, once in each year, and oftener if deemed necessary, to submit to the council, in writing, a classified report of all expenditures and a classified estimate of funds deemed to be needed for the proper maintenance and growth of the public schools of the city, and to request the council to make provisions by appropriation or levy pursuant to § 22-126, for the same.

(15) *Other duties prescribed by State Board.*—To perform such other duties as shall be prescribed by the State Board or are imposed by other parts of this title.

(16) *Acquisition of land.*—City school boards shall, in general, have the same power in relation to the condemnation or purchase of land and to the vesting of title thereof, and also in relation to the title to and management of property of any kind applicable to school purposes, whether heretofore or hereafter set apart therefor, and however set apart, whether by gift, grant, devise, or any other conveyance and from whatever source; as county school boards have in the counties, and in addition thereto, they shall have the further right and power to condemn not in excess of fifteen acres of

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land for any one school when necessary for school purposes, except that when dwellings or yards are invaded not more than five acres may be condemned for any one school; provided, however, that the school board of any city having a population of more than eighty-six thousand and not more than ninety thousand and any city having a population of more than seventy-five thousand but less than eighty-seven thousand, may have the right and power to condemn not in excess of forty-five acres when necessary for school purposes.

(17) *Consolidation of schools.*—To provide for the consolidation of schools whenever such procedure will contribute to the efficiency of the school system.

§ 22-100.1. *Single school board required.*—When the State Board of Education has created a school division, the supervision of schools in any such school division shall be vested in a single school board under the conditions and provisions as hereinafter set forth.

§ 22-100.3. *How composed; appointment and terms of members; vacancies.*—Where a school division is composed of two or more counties or one or more counties with one or more cities, the school board of such division shall be composed of no fewer than six nor more than nine members, the exact number to be determined by agreement of the governing bodies of the counties and cities composing the division. Unless the governing bodies of the counties and cities composing the division agree upon some other equitable and reasonable criteria, the number of members of the board from each county and city of the division shall be apportioned according to the population of each such county or city provided that no county or city shall have fewer than one member. Upon the creation of such school division the members for each county or city composing the division shall be ap-

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pointed by the respective governing bodies thereof and shall serve until the first day of July next following the creation of such division. Within sixty days prior to that day each appointing body shall appoint the required number of members of the division school board as follows: If there be one member, he shall be appointed for a term of four years; if there be two members, one shall be appointed for a term of two years and one for a term of four years; if there be three members, one shall be appointed for a term of two years, one for a term of three years, and one for a term of four years; if there be four members, one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, and one for a term of four years; if there be five members, one shall be appointed for a term of one year, one for a term of two years, one for a term of three years and two for terms of four years; if there be six members one shall be appointed for a term of one year, one for a term of two years, two for terms of three years and two for terms of four years.

Within sixty days prior to the first day of July in each and every year thereafter there shall be appointed by the appropriate appointing body for a term of four years beginning the first day of July next following their appointment, successors to the members of the division school board for their respective counties or cities whose terms expire on the thirtieth day of June on each such year. Any vacancy occurring in the membership of the division school board from any county or city shall be filled for the unexpired term by the appointing body of such county or city. If each county or city has an equal number of members, the governing bodies concerned shall jointly select for a term of four years one person who shall be a member of the division school board only for the purpose of voting in case of an equal division of the regular members of the board on any question requiring

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the action of such board. Such person shall be known as the tie breaker.

If the governing bodies are not able to agree as to the person who shall be the tie breaker, then upon application by any of the governing bodies involved to a circuit court having jurisdiction over a county or city embraced in such school division, the judge thereof shall name the tie breaker and his decision shall be final.

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No. 70-188

In the Supreme Court of the United States

OCTOBER TERM, 1971

PEOLA ANNETTE WRIGHT, ET AL., PETITIONERS

v.

COUNCIL OF THE CITY OF EMPORIA, ET AL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-188

PECOLA ANNETTE WRIGHT, ET AL., PETITIONERS

v.

COUNCIL OF THE CITY OF EMPORIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has substantial responsibility under 42 U.S.C. 2000c-6, and 2000d in the area of school desegregation. The outcome of this case will affect that enforcement responsibility. While the government did not participate in this case in the courts below, the issues presented are related to those presented in *United States v. Scotland Neck City Board of Education*, No. 70-130, now pending before this Court.

STATEMENT

In 1965, the schools in Greensville County, Virginia, were completely segregated on the basis of race (App. 15a). All of the white children attended schools in Emporia, a community located near the center of the

county; all of the black children attended either schools in the outlying county or Greenville County Training School, an elementary school in Emporia (App. 15a, 130a).

In March 1965, petitioners—black school children living in the county and their parents or guardians—sued the county School Board to require compliance with *Brown I*¹ and *Brown II*.² (App. 2a-11a). One month later the Board proposed a freedom-of-choice plan (App. 16a). The district court approved this plan in January 1966, but cautioned that the “plan must be tested * * * by the manner in which it operates to provide opportunities for a desegregated education” and is “subject to review and modification in the light of its operation” (App. 24a).

By the 1967-68 school year very little desegregation had resulted. At this time there were 4146 children enrolled in public schools in the county; 62 percent of the children were black, 38 percent were white (App. 294a). The five formerly all-black schools, which included four elementary schools and one high school, were still attended only by black children (*id.*). In the two formerly all-white schools (a high school and an elementary school), both of which were in Emporia, 94 percent of the students were white (*id.*). The dual school system thus remained virtually intact.

In the summer preceding the 1967-68 school year, the Town of Emporia became a city of the second class³ and thereby became obligated to maintain a

¹ 347 U.S. 483.

² 349 U.S. 294.

³ Va. Code Ann. § 15.1-978, see especially § 15.1-983.

general system of free public schools (App. 118a, 226a-227a).⁴ The newly-appointed city school board then began negotiations with county officials to work out a satisfactory educational arrangement for city residents (App. 227a-228a).⁵ Meanwhile, for all the children in the county, including those living in Emporia, the traditional attendance pattern continued (App. 227a, 294a).

When the county Board of Supervisors rejected a proposal for a joint county-city operation (App. 30a), the city, in April 1968, agreed that the Greenville County School Board would continue to provide public schools for the City of Emporia (App. 32a-36a). Expressing dissatisfaction with this arrangement, city officials contended that they had been forced into the agreement by the threat of the county officials to terminate public school services to students residing in the city (App. 305a): Between April 1968 and June 1969, however, no efforts were made to terminate the agreement nor were any studies conducted concerning the feasibility of other methods of operating the schools (App. 136a, 147a-149a).

In the summer of 1968, after this Court's decision in *Green v. County School Board of New Kent County*, 391 U.S. 430, petitioners filed a motion for further relief seeking a new desegregation plan for the Greenville County schools that would promise realistically to convert the school system to a unitary non-racial operation (App. 37a). The district court

⁴ Va. Code Ann. § 22-1 and § 22-93.

⁵ Virginia law provided several alternative methods of school operation. Va. Code Ann. §§ 22-7, 22-99, and 22-100.1 to 22-100.2; see also Petitioners' Brief, at p. 5 n. 6; App. 300a.

ordered the county School Board to prepare such a desegregation plan (App. 50a). After various delays, the Board in January 1969 submitted a plan that, if accepted, would have continued freedom-of-choice with minor modifications (App. 38a, 51a).

After further hearings and other proceedings, during which the county Board submitted a report and petitioners proposed a plan for desegregating the county schools, the court on June 23, 1969, found that the county Board's plan would merely substitute one segregated system for another (App. 46a-47a, 50a-52a). The court therefore ordered the county Board to implement petitioners' plan for the upcoming 1969-1970 school year (App. 52a-53a). This plan eliminated the dual attendance patterns by a zoning-pairing arrangement for students in grades 1-4, who would attend the four formerly all-black elementary schools, only one of which was in Emporia; grades 5-6 would be served by the formerly all-white Emporia Elementary School; grades 7-9 would be served by the formerly all-black Wyatt High School in the county; and students in grades 10-12 would attend the formerly all-white Greensville County High School in Emporia (App. 46a-47a).⁶

Two weeks later, on July 7, 1969, the city Council sent a letter to the county Board of Supervisors stating in part (App. 56a):⁷

⁶ At no time during the pendency of the above matter did the city Council or the city School Board meet, or otherwise confer, with the county officials in an attempt to devise a different plan of student assignment to the county schools (App. 182a-183a, 193a).

⁷ See also App. 163a, 235a.

In 1967-68 when the then Town of Emporia, through its governing body, elected to become a city of the second class, it was the considered opinion of the Council that the educational interest of Emporia Citizens, their children and those of the citizens and children of Greensville County, could best be served by continuing a combined City-County school division, thus giving students from both political subdivisions full benefits of a larger school system.

The letter then stated that the court-ordered desegregation plan had changed the situation to such an extent that the city had decided to establish a separate system (App. 57a). The city offered several reasons for this decision: (1) the court's order required "massive relocation of school classes," "excessive busing of students," "mixing of students without regard to "individual scholastic accomplishment or ability"; and (2) the city students did not contribute to the "inbalance" [sic] in the school system" (App. 57a). The Mayor later testified that city officials desired to prevent the emergence of a private school system and

*The three elementary schools located in the county were within a mile or two of the city limits. (App. 132a, 133a).

*The only "ability grouping" plan ever considered by the County School Board, so far as the record indicates, was a proposal presented after the district court hearing of February 1969. Apparently, no such assignment plan had ever been used by the school system in the past (App. 40a-45a):

¹⁰ The record, however, is to the contrary. In the 1968-1969 school year, 543 white and 580 black students resided in the city (App. 304a) yet only 98 black students attended the two white schools in the city, while 387 black and no white students attended Greensville County Training School, which was also located in Emporia (App. 130a, 298a).

wanted to "kill this private school business before it got started" (App. 121a-122a).

The city's letter concluded by proposing termination of the existing city-county agreements, establishment of a procedure for equity settlement, and immediate transfer of title to all school property "in the Corporate Limits" to the city (App. 58a-60a). Student transfers from the county would be accepted by the city on a tuition, no transportation basis (App. 60a).¹¹

The county School Board refused to agree because of its obligations under the district court's order and because "this Board believes that such action is not in the best interest of the children in Greenville County * * * " (App. 69a). The State Board of Education tabled the city's request to establish the city as a school division "in light of matters pending in the federal court" (App. 198a).¹²

If the city's proposals had been implemented, three schools—Emporia Elementary, Greenville County Training, and Greenville County High School—would

¹¹ The city officials later stated that they would not allow transfers until they were permitted to do so by the district court (App. 319a n. 3).

¹² Meanwhile, at the request of the county School Board, the district court modified the desegregation plan on July 30, 1969. (App. 85a). The modified plan established the following attendance pattern:

Grades and school:	Located in
1-2-3, Emporia Elementary-----	City.
4-5, Moton Elementary-----	County.
5-6, Belfield Elementary-----	County.
7, Zion Elementary-----	County.
8-9, Junior High (Wyatt High)-----	County.
10-11-12, Senior High (Greenville County High)-----	City.
Special Education, County Training-----	City.

have been removed from the county system. These schools, which had served 2111 students in 1967-1968 (App. 294a), would be available for the 1123 city students in the school year beginning in 1969 (App. 304a).¹³ The other four schools in the County—Moton, Zion, Belfield and Wyatt High School, which had served a total of 2025 students (all black) in 1967-1968—would be available in 1969 for the remaining 2616 students in the County (App. 304a).

Moreover, with separate city and county school systems, 52 percent of the city's students would be black and 48 percent would be white,¹⁴ while 72 percent of the county's students would be black and 28 percent would be white¹⁵ (App. 304a). The formerly all-white city high school would have a white majority (52 percent white and 48 percent black) (App. 304a). If all schools in the county were operated as a single system, as they had been in the preceding years when the students were segregated on the basis of race, 66 percent of the students would be black, and 34 percent would be white (App. 304a).¹⁶

¹³ The Mayor of Emporia testified that the city system would not need, and did not desire, to use the formerly all-black Greensville County Training School, which he said was "in bad shape" (App. 120a, 134a). He further testified that the three elementary schools located in the county were on "inferior sites" and situated in "out-of-the-way places" (App. 133a).

¹⁴ There would be 580 black students and 543 white students (App. 304a).

¹⁵ There would be 1888 black students and 728 white students (App. 304a).

¹⁶ There would be 2477 black students and 1282 white students (App. 304a).

On August 1, 1969, petitioners filed a supplemental complaint naming the city Council and city school board members as defendants and seeking to enjoin them from forming a separate school system (App. 84a-87a). After a hearing, the district court issued a preliminary injunction on August 8, 1969, prohibiting the city officials from interfering with implementation of the court's previous order (App. 195a). See n. 6 *supra*).

Three months later, the city began a study to determine the feasibility of operating a separate city school system (App. 200a). The proposed school budget and educational program submitted on December 3, 1969, after completion of the study (App. 200a, 202a-203a), indicated that the city would have more wealth per child than the county (App. 208a), but that the city system would be so small¹⁷ that operation would be more costly (App. 207a-208a). The proposed budget would have required a 30 percent increase in city taxes in order to support the system (App. 291a).

After a hearing on December 8, 1969, the district court issued an opinion and order on March 2, 1970, enjoining operation of a separate city school system until further order of the court (App. 293a, 310a). The court held that the city officials were successors, at least in part, to the powers of the county officials

¹⁷ The city school board's expert testified that the optimum high school would be 1200-1500 students (App. 283a). Neither the county nor the city, if divided, would approach that student population (App. 304a, 305a). In the combined system, however, there would be 1428 students in grades 8-12 (App. 297a).

and, therefore, subject to the previous desegregation decree. Accordingly, the court treated the city officials' application as a motion to modify that decree (App. 298a-303a).

Considering the proposal on that basis, the court found that establishment of a separate city system would cause a substantial shift in the racial composition of the schools under the existing plan.¹⁸ The city system would have an elementary school with a slight black majority and a high school with a slight white majority;¹⁹ all grades in the county, on the other hand, would be more than two-thirds black (App. 304a-305a). The city's proposal would have adverse effects on the remaining county system (App. 306a-307a) and "would make the successful operation of the [existing] unitary plan even more unlikely" (App. 306a). The court also found that the motives of the city officials for their decision were mixed, but that race was a factor since the city acted in order to make the schools more attractive to white residents so that they would not send their children to private schools, as they might have done if the schools were operated in accordance with the court's desegregation order (App. 305a, 307a).

Relying on *Monroe v. Board of Commissioners*, 391 U.S. 450, the court concluded that it could not accept the city's proposal because the city could not show "that such a plan will further rather than delay con-

¹⁸ See p. 7 *supra*.

¹⁹ The white percentage could be expected to increase if, as the city officials predicted, students returned to the city schools from private schools (App. 304a).

version to a unitary, nonracial, nondiscriminatory school system," 391 U.S. at 459 (App. 308a). The court noted, however, that there were a number of alternative methods of operation open to the city, including joint city-county operation or operation of a separate city system if it would not "so prejudice the prospects for [a] unitary [system]," and that the court would modify its decree in the future for good cause shown (App. 309a).

The court of appeals, sitting *en banc*,²⁰ reversed (App. 311a-319a). Focusing principally on the "shift in the racial balance" that would result from proposed redistricting, the majority applied the following standard to determine the validity of the city's attempted withdrawal from the county system (App. 313a):

If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of re-segregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation.

The court compared the racial composition of the county system before and after Emporia's secession—66 percent black and 34 percent white before, as compared with 72 percent black and 28 percent white

²⁰ Judges Sobeloff and Butzner did not participate (App. 311a).

after²¹—and concluded that the city did not seek to separate from the county system in order to perpetuate segregation (App. 316a). In the majority's view of the record, the city's predominant purpose or motivation²² in withdrawing was not to discriminate on the basis of race, but rather to improve the quality of the schools and to alleviate unfair tax allocations (App. 314a, 316a-317a).

Judge Winter dissented (App. 336a). In his view, the validity of the city's action should be judged in light of the test established by this Court in *Green*, *supra*—that a proposed method of school operation less effective than an existing and workable desegregation plan bears a heavy burden of justification (App. 337a). Applying that standard to the instant case, he concluded that the 20.5 percent difference in white student population between the city and county, as well as the other deleterious effects of separation, were not justified by the reasons advanced by the city (App. 340a-342a).

ARGUMENT

For fifteen years after *Brown I* the schools in Greensville County remained racially segregated. Finally in June 1969, four years after petitioners instituted their suit seeking desegregation, the district court ordered the county School Board to implement a plan that would dismantle the existing dual system. The validity of the city of Emporia's attempt, two

²¹ But see n. 23 *infra*.

²² The court used "purpose" and "motivation" interchangeably throughout the opinion (App. 314a, 316a-317a).

weeks later, to immunize itself from the imminent desegregation of the county system by creating its own school district can be assessed only against this background. See *Green v. County School Board*, 391 U.S. 430, 437. For the inescapable fact is that until the court's order, a dual school system flourished in Greenville County and the traditionally white-only schools in the city of Emporia comprised the white branch of that unconstitutional system.

In these circumstances, the question presented by this case is whether creation of a separate school system for the city would impede the dismantling of the dual system. That the city's proposed action is authorized by state law or that state law allowed the city to deprive the county School Board of authority over the city's school children makes no difference. As this court held in a case decided after the decision of the court below:

[I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

North Carolina State Board of Education v. Swann, 402 U.S. 43, 45. See also *Gomillion v. Lightfoot*, 364 U.S. 339.

Thus, what matters is not how withdrawal of the city was to be accomplished, but rather what effect that action would have on the court-ordered desegregation of the schools in the county, including those within the city of Emporia. Since all of those schools had

been operated as a single, segregated system, the city's attempted separation is to be judged in light of the standards applicable to any proposal affecting conversion of a dual system into a unitary one. That is, if creation of separate city and county school systems would give rise to a less effective method of achieving desegregation, there is "at the least * * * a heavy burden upon the [city] to explain its preference" for this course of action. *Green v. County School Board*, *supra*, 391 U.S. at 439; *North Carolina State Board of Education v. Swann*, *supra*, 402 U.S. at 45.

The district court therefore properly considered the schools within the city and those elsewhere within the county as a single system for the purposes of desegregation—just as they had been a single system for purposes of segregation—and viewed the city's attempted withdrawal as a proposed alternative to the plan adopted in the court's outstanding desegregation decree (App. 303a). This approach is in accord not only with the decisions of this Court, but also with the decisions of other courts involving the carving out of new districts from larger districts that are desegregating under court order. *Lee and United States v. Macon County Board of Education*, 448 F. 2d 746 (C.A. 5); *Burleson v. County Board of Election Commissioners of Jefferson County*, 308 F. Supp. 352, 357 (E.D. Ark.), affirmed, 432 F. 2d 1356 (C.A. 8); *Stout and United States v. Jefferson County Board of Education*, 448 F. 2d 403 (C.A. 5).

We also believe that the district court properly concluded that a separate city system would be a less effective method of desegregation and that the

city failed to meet its heavy burden of justification under *Green*. The city system would have had a student population consisting of 52 percent black students and 48 percent white; this would have left the county system 72 percent black and 28 percent white. The substantial disparity in racial composition is apparent.²³ This disparity is all the more significant in light of the fact that the schools to be utilized in the proposed more-white city system, which would increase in racial percentages from 28 percent white to 48 percent white, were the traditionally white-only schools in the county's dual system. Indeed, the city intended to operate one of these two schools—Greenville County High School—with a white majority (App. 304a), a majority the city expected to increase as white students were attracted back from private schools (App. 304a).²⁴ This is not the way to dismantle a rigid dual school system still functioning 15 years after *Brown I*. It is at the very least a less effective way to eliminate the vestiges of racial segregation than the plan ordered by the district court, see n. 12 *supra*.

Moreover, in exercising its "broad power to fashion a remedy that will assure a unitary school system,"

²³ If operated as a combined city-county system, it would be 66 percent black and 34 percent white. Judge Winter, in dissent, emphasized the difference between the 28 percent of white students in the county and 48 percent of white students in the city under the new plan, and concluded (App. 340a): "To allow the creation of a substantially whiter haven in the midst of a small and mainly black area is a step backward in the integration process."

²⁴ The disparity undoubtedly would also have been increased by implementation of the city's transfer provision (see n. 11 *supra*, and accompanying text).

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16, the district court could properly take into account more than the resulting racial percentages if the city's separation were allowed. The district court properly considered the educational advantages of a single system for all the children in the county, including those in Emporia (App. 306a-307a). See *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 18-19. It is also significant that all the buildings in the county had been built as black schools and three of them were located on inferior sites in "out-of-the-way" places. On the other hand, the two buildings the city intended to use were the only previously white schools in the county system. Thus, the more-white district would be assigned the previously white schools while the more-black district would be assigned the previously black schools, which were considered inferior.²⁵ Again, this is not the way to dismantle a dual school system and eliminate the vestiges of racial segregation "root and

²⁵In addition, it appears likely (see Defendants' Answers to Plaintiffs' Interrogatories, June 18, 1965, indicating the capacities of the county schools) that the county Board would have had to use at least temporarily, the other, formerly all-black school in the city—Greensville County Training School—which city officials considered in "bad shape" and did not intend to utilize (see note 13 *supra*). This would require transporting county students into the city in essentially the same dual attendance pattern that existed when the county system operated on a segregated basis: students from the more-black district would attend formerly all-black Greensville County Training School in the city while students from the more-white district would attend the formerly all-white Emporia Elementary or Greensville County High Schools, both of which are also in the city.

branch," *Green v. County School Board*, *supra* 391 U.S. at 438.

In our brief in *United States v. Scotland Neck City Board of Education*, No. 70-130, this Term, we set forth the reasons why the "primary * * * purpose" test adopted by the court of appeals is, in our view, an improper standard (Pet. Brief, at pp. 26-29);²⁶ we will not repeat that discussion here. We point out, however, that in this case the sequence of events alone gives rise to an inference that the purpose to avoid the full impact of desegregation played a significant role in the city's decision to withdraw from the county school system, and the district court thus properly found that the city's motives, while mixed, were partially racial (App. 305a, 307a). In the court of appeals' view, the racial motive was not the primary one (App. 316a). But a denial of equal protection of the laws does not depend on whether racial motives predominated; the Constitution does not permit a state to be just a little bit discriminatory. At all events, in this case there is no dispute that the dual system violated the Constitution; the only question is how to remedy that constitutional violation. And, as we have discussed above, the district court properly concluded that a separate city system would result in a less effective remedy for dismantling the dual system.

While the city's desire to provide quality education is commendable, the district court made plain that it would consider any proposed modifications in the

²⁶ We are furnishing respondents in this case with a copy of our *Scotland Neck* brief.

future that would achieve that end in the context of a unitary operation. This is precisely the approach required by *Brown II*, *supra*, and by *Alexander v. Holmes County Board of Education*, 396 U.S. 19. In these circumstances, the respondents did not satisfy their heavy burden under *Green*, as Judge Winter pointed out in dissent (App. 341a-342a) and, accordingly, the judgment of the district court should have been affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1972.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WRIGHT ET AL. *v.* COUNCIL OF THE CITY OF EMPORIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 70-188. Argued March 1, 1972—Decided June 22, 1972

In 1967, Emporia, Virginia, which is located in the center of Greensville County, changed from a "town" to a politically independent "city" authorized by state law to provide its own public school system. By a shared-cost agreement with the county, Emporia in 1968 continued an arrangement, which antedated its change of status, to use the county public school system for education of its children. As a consequence of the present desegregation lawsuit initiated in 1965, the single school division was operating under a "freedom of choice" plan approved by the District Court. Petitioners moved to modify that plan following this Court's decision in *Green v. County School Board*, 391 U. S. 430. The District Court, after a hearing, on June 25, 1969, ordered petitioners' "pairing plan," to take effect as of the start of the 1969-1970 school year. Two weeks after entry of the District Court's decree, the city announced its plan to operate a separate school system and sought termination of the 1968 agreement. On August 1, 1969, petitioners filed a supplemental complaint seeking to enjoin the city council and school board (named as additional parties defendant) from withdrawing Emporia children from the county schools. Following hearings, the District Court found that the effect of Emporia's withdrawal would be a "substantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools." In addition to the disparity in racial percentages, the court found that the proportion of whites in county schools might drop as county-school whites shifted to private academies, while some whites might return to city schools from the academies they previously attended; that two formerly all-white schools (both better equipped and better located than the county schools) are in Emporia, while all

Syllabus

the schools in the surrounding county were formerly all-Negro; and that Emporia, which long had the right to establish a separate school system, did not decide to do so until the court's order prevented the county from continuing its long-maintained segregated school system. The court concluded that Emporia's withdrawal would frustrate the June 25 decree and enjoined respondents from pursuing their plan. Holding that the question whether new school district boundaries should be permitted in areas with a history of state-enforced racial segregation must be resolved in terms of the "dominant purpose of [the] boundary realignment," the Court of Appeals concluded that Emporia's primary purpose was "benign" and not a mere "cover-up" for racial discrimination, and reversed. *Held*:

1. In determining whether realignment of school districts by officials comports with the requirements of the Fourteenth Amendment, courts will be guided, not by the motivation of the officials, but by the effect of their action. Pp. 10-11.

2. In the totality of the circumstances of this case, the District Court was justified in concluding that Emporia's establishment of a separate school system would impede the process of dismantling the segregated school system. Pp. 11-19.

442 F. 2d 570, reversed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN, POWELL, and REHNQUIST, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70-188

Pecola Annette Wright et al.,
Petitioners,
v.
Council of the City of
Emporia et al.

On Writ of Certiorari to
the United States Court
of Appeals for the
Fourth Circuit.

[June 22, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

We granted certiorari in this case, as in No. 70-130, *United States v. Scotland Neck City Board of Education*,¹ *post*, to consider the circumstances under which a federal court may enjoin state or local officials from carving out a new school district from an existing district that has not yet completed the process of dismantling a system of enforced racial segregation. We did not address ourselves to this rather narrow question in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, and its companion cases decided last Term,² but the problem has confronted other federal courts in one form or another on numerous occasions in recent years.³

¹ Together with No. 70-187, *Cotton v. Scotland Neck City Board of Education*.

² The companion cases were *Davis v. Board of School Commissioners*, 402 U. S. 33; *McDaniel v. Barresi*, 402 U. S. 39; *Board of Education v. Swann*, 402 U. S. 43; and *Moore v. Board of Education*, 402 U. S. 47.

³ On the same day that it reversed the District Court orders in this case and in the Scotland Neck cases, the Court of Appeals for the Fourth Circuit affirmed an order enjoining the creation of a new

Here, as in *Scotland Neck*, the Court of Appeals reversed a district court decision enjoining the creation of a new school district. 442 F. 2d 570. We conclude that the Court of Appeals erred in its interpretation of the legal principles applicable in cases such as these, and that the District Court's order was proper in the circumstances of this case.

I

The City of Emporia lies near the center of Greensville County, Virginia, a largely rural area located on the North Carolina border. Until 1967, Emporia was a "town" under Virginia law, which meant that it was a part of the surrounding county for practically all purposes, including the purpose of providing public education for children residing in the county.

In 1967, Emporia, apparently dissatisfied with the County's allocation of revenues from the newly enacted state sales tax, successfully sought designation as a "city of the second class."⁴ As such, it became politically independent from the surrounding county, and undertook a separate obligation under state law to provide free public schooling to children residing within its borders.⁵ To fulfill this responsibility, Emporia at first

school district in another county of North Carolina. *Turner v. Littleton-Lake Gaston School District*, 442 F. 2d 584. Other cases dealing with attempts to split school districts in the process of desegregation are *Lee v. Macon County Board of Education*, 448 F. 2d 746; *Stout v. Jefferson County Board of Education*, 448 F. 2d 403; *Haney v. County Board of Education*, 410 F. 2d 920; *United States v. Texas*, 321 F. Supp. 1043, 1052, aff'd, with modifications, 447 F. 2d 441; *Burleson v. County Board of Election Commissioners*, 308 F. Supp. 352 aff'd, 432 F. 2d 1356; *Aytch v. Mitchell*, 320 F. Supp. 1372.

⁴ Code of Va., §§ 15.1-982.

⁵ See Code of Va., § 22-93; *Colonial Heights v. Chesterfield County*, 196 Va. 155, 82 S. E. 2d 566 (1954).

sought the County's agreement to continue operating the school system on virtually the same basis as before, with Emporia sharing in the administration as well as the financing of the schools.⁶ When the county officials refused to enter into an arrangement of this kind, Emporia agreed to a contract whereby the County would continue to educate students residing in the city in exchange for Emporia's payment of a specified share of the total cost of the system. Under this agreement, signed in April, 1968, Emporia had a formal voice in the administration of the schools only through its participation in the selection of a superintendent. The city and county were designated as a single school "division" by the State Board of Education,⁷ and this arrangement was still in effect at the time of the District Court's order challenged in this case.

This lawsuit began in 1965, when a complaint was filed on behalf of Negro children seeking an end to state-enforced racial segregation in the Greenville County school system. Prior to 1965, the elementary and high schools located in Emporia served all white children in the county, while Negro children throughout the county were assigned to a single high school or one

⁶ Emporia was entitled under state law to establish an independent school system when it became a city in 1967, but it chose not to do so because, according to the testimony of the chairman of the city school board, a separate system did not seem practical at the time. In a letter to the county Board of Supervisors in July 1969, the Emporia City Council stated that it had authorized a combined system in 1968 because it believed that "the educational interest of Emporia citizens, their children and those of the citizens and children of Greenville County, could best be served by continuing a combined City-County school division, thus giving students from both political subdivisions full benefits of a larger school system."

⁷ Under Virginia law as it stood in 1969, the school "division" was the basic unit for the purpose of school administration. See Code of Va., §§ 22-30, 22-34, 22-100.1.

of four elementary schools, all but one of which were located outside the Emporia town boundary. In January, 1966, the District Court approved a so-called "freedom of choice" plan that had been adopted by the county in April of the previous year. *Wright v. School Board of Greensville County*, 252 F. Supp. 378. No white students ever attended the Negro schools under this plan, and in the 1968-1969 school year only 98 of the county's 2,510 Negro students attended white schools. The school faculties remained completely segregated.

Following our decision in *Green v. County School Board*, 391 U. S. 430, holding that a freedom of choice plan was an unacceptable method of desegregation where it failed "to provide prompt and effective disestablishment of a dual system," *id.*, at 438, the petitioners filed a motion for further relief. The District Court ordered the county to demonstrate its compliance with the holding in *Green*, or to submit a plan designed to bring the schools into compliance. After various delays, during which the freedom of choice system remained in effect, the county submitted two alternative plans. The first would have preserved the existing system with slight modifications, and the second would have assigned students to schools on the basis of curricular choices or standardized test scores. The District Court promptly rejected the first of these proposals, and took the second under advisement. Meanwhile, the petitioners submitted their own proposal, under which all children enrolled in a particular grade level would be assigned to the same school, thus eliminating any possibility of racial bias in pupil assignments. Following an evidentiary hearing on June 23, 1969, the District Court rejected the county's alternative plan, finding that it would "substitute . . . one segregated school system for another segregated school system." By an order dated June 25, the court ordered the county to implement

the plan submitted by the petitioners, referred to by the parties as the "pairing" plan, as of the start of the 1969-1970 school year.⁸

Two weeks after the District Court entered its decree, the Emporia City Council sent a letter to the county Board of Supervisors announcing the city's intention to operate a separate school system beginning in September. The letter stated that an "in-depth study and analysis of the directed school arrangement reflects a totally unacceptable situation to the Citizens and City Council of the City of Emporia." It asked that the 1968 city-county agreement be terminated by mutual consent, and that title to school property located within Emporia be transferred to the city. The letter further advised that children residing in the county would be permitted to enroll in the city schools on a tuition basis.⁹ At no time during this period did the city officials meet with the county council or school board to discuss the implementation of the pairing decree, nor did they inform the District Court of their intentions with respect to the separate school system.

The county school board refused either to terminate the existing agreement or to transfer school buildings to Emporia, citing its belief that Emporia's proposed action was "not in the best interest of the children in

⁸ The plan was later modified in certain respects at the request of the county school board, and as modified it has been in operation since September 1969. Because the four schools located outside Emporia's city limits are all in close proximity to the city, the "pairing" plan apparently involved little additional transportation of students.

⁹ The District Court took special note of this transfer arrangement in its memorandum accompanying the preliminary injunction issued in August 1969. At the time of the final hearing, however, the respondents assured the court that if allowed to operate a separate system, they would not permit transfers from the county without prior permission of the court.

Greensville County." The City Council and the City School Board nevertheless continued to take steps toward implementing the separate system throughout the month of July. Notices were circulated inviting parents to register their children in the city system, and a request was made to the State Board of Education to certify Emporia as a separate school division. This request was tabled by the State Board at its August meeting, "in light of matters pending in the federal court."

According to figures later supplied to the District Court, there were 3,759 children enrolled in the unitary system contemplated by the desegregation decree, of whom 66% were Negro and 34% were white. Had Emporia established a separate school system, 1,123 of these students would have attended the city schools, of whom 48% were white. It is undisputed that the city proposed to operate its own schools on a unitary basis, with all children enrolled in any particular grade attending the same school.

On August 1, 1969, the petitioners filed a supplemental complaint naming the members of the Emporia City Council and the City School Board as additional parties defendant,¹⁰ and seeking to enjoin them from withdrawing Emporia children from the county schools. At the conclusion of a hearing on August 8, the District Court found that the establishment of a separate school system by the city would constitute "an impermissible

¹⁰ Because the county school board had ultimate responsibility for the administration of the schools under the combined system, the members of the Emporia school board were not originally parties to the lawsuit. But the District Court's desegregation decree bound both county officials "and their successors," and the District Court treated the Emporia school board, insofar as they intended to replace the county board as administrators of part of the system under court order, as "successors" to the members of the county board.

interference with and frustration of" its order of June 25, and preliminarily enjoined the respondents from taking "any action which would interfere in any manner whatsoever with the implementation of the Court's order heretofore entered. . . ."

The schools opened in September under the pairing order, while Emporia continued to work out detailed plans and budget estimates for a separate school system in the hope that the District Court would allow its implementation during the following school year. At a further hearing in December, the respondents presented an expert witness to testify as to the educational advantages of the proposed city system, and asked that the preliminary injunction be dissolved. On March 2, 1970, the District Court entered a memorandum opinion and order denying the respondents' motion and making the injunction permanent. 309 F. Supp. 671. The Court of Appeals for the Fourth Circuit reversed, 442 F. 2d 570, but stayed its mandate pending action by this Court on a petition for certiorari, which we granted. 404 U. S. 820.

II

Emporia takes the position that since it is a separate political jurisdiction entitled under state law to establish a school system independent of the county, its action may be enjoined only upon a finding either that the state law under which it acted is invalid, that the boundaries of the city are drawn so as to exclude Negroes, or that the disparity of the racial balance of the city and county schools of itself violates the Constitution. As we read its opinion, the District Court made no such findings, nor do we.

The constitutional violation that formed the predicate for the District Court's action was the enforcement until 1969 of racial segregation in a public school sys-

tem of which Emporia had always been a part. That finding has not been challenged, nor has Emporia questioned the propriety of the "pairing" order of June 25, 1969, which was designed to remedy the condition that offended the Constitution. Both before and after it became a city, Emporia educated its children in the county schools. Only when it became clear—15 years after our decision in *Brown v. Board of Education*, 347 U. S. 483—that segregation in the county system was finally to be abolished, did Emporia attempt to take its children out of the county system. Under these circumstances, the power of the District Court to enjoin Emporia's withdrawal from that system need not rest upon an independent constitutional violation. The court's remedial power was invoked on the basis of a finding that the dual school system violated the Constitution, and since the city and the county constituted but one unit for the purpose of student assignments during the entire time that the dual system was maintained, they were properly treated as a single unit for the purpose of dismantling that system.

In *Green v. County School Board*, 391 U. S. 430, the issue was whether the school board's adoption of a "freedom of choice" plan constituted adequate compliance with the mandate of *Brown v. Board of Education*, 349 U. S. 294 (*Brown II*). We did not hold that a freedom of choice plan is of itself unconstitutional. Rather, we decided that *any* plan is "unacceptable" where it "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system. . . ." 391 U. S., at 438. In *Monroe v. Board of Commissioners*, 391 U. S. 450, we applied the same principle in rejecting a "free transfer" plan adopted by the school board as a method of desegregation:

"We do not hold that 'free transfer' can have no place in a desegregation plan. But like 'freedom

of choice, if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable." *Id.*, at 459.

The effect of Emporia's proposal was to erect new boundary lines for the purpose of school attendance in a district where no such lines had previously existed, and where a dual school system had long flourished. Under the principles of *Green* and *Monroe*, such a proposal must be judged according to whether it hinders or furthers the process of school desegregation. If the proposal would impede the dismantling of the dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out.

The Court of Appeals apparently did not believe this case to be governed by the principles of *Green* and *Monroe*.¹¹ It held that the question whether new school district boundaries should be permitted in areas with a history of state-enforced racial segregation is to be resolved in terms of the "dominant purpose of [the] boundary realignment."

"If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation." 442 F. 2d, at 572.

Although the District Court had found that "in a sense, race was a factor in the city's decision to secede," 309 F.

¹¹ The decision of the Court of Appeals was rendered less than a month prior to our decision in *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*.

Supp., at 680, the Court of Appeals found that the primary purpose of Emporia's action was "benign," and was not "merely a cover-up" for racial discrimination. 442 F. 2d, at 574.

This "dominant purpose" test finds no precedent in our decisions. It is true that where an action by school authorities is motivated by a demonstrated discriminatory purpose, the existence of that purpose may add to the discriminatory effect of the action by intensifying the stigma of implied racial inferiority. And where a school board offers non-racial justifications for a plan that is less effective than other alternatives for dismantling a dual school system, a demonstrated racial purpose may be taken into consideration in determining the weight to be given to the proffered justification. Cf. *Green, supra*, at 439. But as we said in *Palmer v. Thompson*, 403 U. S. 217, 225, it "is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators," and the same may be said of the choices of a school board. In addition, an inquiry into the "dominant" motivation of school authorities is as irrelevant as it is fruitless. The mandate of *Brown II* was to desegregate schools, and we have said that "[t]he measure of any desegregation plan is its effectiveness." *Davis v. Board of School Commissioners*, 402 U. S. 33, 37. Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect.

The reasoning of the Court of Appeals in this case is at odds with that of other federal courts which have held that splinter school districts may not be created "where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on de-

segregation of the county school district." *Lee v. Macon County Bd. of Education*, 448 F. 2d 746, 752. See also *Stout v. Jefferson County Bd. of Education*, 448 F. 2d 403, 404; *Haney v. County Bd. of Education*, 410 F. 2d 920, 924; *Burleson v. County Bd. of Election Commissioners*, 308 F. Supp. 352, 356, aff'd, 432 F. 2d 1356; *Aytch v. Mitchell*, 320 F. Supp. 1372, 1377. Though the purpose of the new school districts was found to be discriminatory in many of these cases, the courts' holdings rested not on motivation or purpose, but on the effect of the action upon the dismantling of the dual school systems involved. That was the focus of the District Court in this case, and we hold that its approach was proper.

III

The basis for the District Court's ruling was its conclusion that if Emporia were allowed to establish an independent system, Negroes remaining in the county schools would be deprived of what *Brown II* promised them: a school system in which all vestiges of enforced racial segregation have been eliminated. The District Court noted that the effect of Emporia's withdrawal would be a "substantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools." 309 F. Supp., at 680. In addition, the court found that the departure of the city's students, its leadership, and its financial support, together with the possible loss of teachers to the new system, would diminish the chances that transition to unitary schools in the county would prove "successful."

Certainly, desegregation is not achieved by splitting a single school system operating "white schools" and "Negro schools" into two new systems, each operating unitary schools within its borders, where one of the

two new systems is, in fact, "white" and the other is, in fact, "Negro." Nor does a court supervising the process of desegregation exercise its remedial discretion responsibly where it approves a plan that, in the hope of providing better "quality education" to some children, has a substantial adverse effect upon the quality of education available to others. In some cases, it may be readily perceived that a proposed subdivision of a school district will produce one or both of these results. In other cases, the likelihood of such results may be less apparent. This case is of the latter kind, but an examination of the record shows that the District Court's conclusions were adequately supported by the evidence.

Data submitted to the District Court at its December hearing showed that the school system in operation under the "pairing" plan, including both Emporia and the county, had a racial composition of 34% white and 66% Negro. If Emporia had established its own system, and had total enrollment remained the same, the city's schools would have been 48% white and 52% Negro, while the county's schools would have been 28% white and 72% Negro.

We need not and do not hold that this disparity in the racial composition of the two systems would be a sufficient reason, standing alone, to enjoin the creation of the separate school district. The fact that a school board's desegregation plan leaves some disparity in racial balance among various schools in the system does not alone make that plan unacceptable.¹² We observed in *Swann, supra*, that "the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial com-

¹² The court order that we approved in *Swann, supra*, itself provided for student bodies ranging from 9% Negro to 38% Negro.

position of the school system as a whole." 402 U. S., at 24.

But there is more to this case than the disparity in racial percentages reflected by the figures supplied by the school board. In the first place, the District Court found that if Emporia were allowed to withdraw from the existing system, it "may be anticipated that the proportion of whites in county schools may drop as those who can register in private academies," 309 F. Supp., at 680, while some whites might return to the city schools from the private schools in which they had previously enrolled. Thus, in the judgment of the District Court, the statistical breakdown of the 1969-1970 enrollment figures between city residents and county residents did not reflect what the situation would have been had Emporia established its own school system.

Second, the significance of any racial disparity in this case is enhanced by the fact that the two formerly all-white schools are located within Emporia, while all the schools located in the surrounding county were formerly all-Negro. The record further reflects that the school buildings in Emporia are better equipped and are located on better sites than are those in the county. We noted in *Swann* that factors such as these may in themselves indicate that enforced racial segregation has been perpetuated:

"Independent of student assignments, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." 402 U. S., at 18.

Just as racial balance is not required in remedying a dual system, neither are racial ratios the sole consideration to be taken into account in devising a workable remedy.

The timing of Emporia's action is a third factor that was properly taken into account by the District Court in assessing the effect of the action upon children remaining in the county schools. While Emporia had long had the right under state law to establish a separate school system, its decision to do so came only upon the basis of—and, as the city officials conceded, in reaction to—a court order that prevented the county system from maintaining any longer the segregated system that had lingered for 15 years after *Brown I*. In the words of Judge Winter, dissenting in the Court of Appeals, “[i]f the establishment of an Emporia school district is not enjoined, the black students in the county will watch as nearly one-half the total number of white students in the county abandon the county schools for a substantially whiter system.” 442 F. 2d, at 590. The message of this action, coming when it did, cannot have escaped the Negro children in the county. As we noted in *Brown I*: “To separate [Negro school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” 347 U. S., at 494. We think that, under the circumstances, the District Court could rationally have concluded that the same adverse psychological effect was likely to result from Emporia's withdrawal of its children from the Greensville County system.

The weighing of these factors to determine their effect upon the process of desegregation is a delicate task that is aided by a sensitivity to local conditions, and the judgment is primarily the responsibility of the district

judge. See *Brown II*, *supra*, at 299.¹³ Given the totality of the circumstances, we hold that the District Court was justified in its conclusion that Emporia's establishment of a separate system would actually impede the process of dismantling the existing dual system.

IV

Against these considerations, Emporia advances arguments that a separate system is necessary to achieve "quality education" for city residents, and that it is unfair in any event to force the city to continue to send its children to schools over which the city, because of the character of its arrangement with the county, has very little control. These arguments are entitled to consideration by a court exercising its equitable discretion where they are directed to the feasibility or practicality of the proposed remedy. See *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, at 31. But as we said in *Green v. County School Board*, *supra*, the availability of "more promising courses of action" to dismantle a dual system "at the least . . . places a heavy burden upon the board to explain its preference for an apparently less effective method." 391 U. S., at 439.

In evaluating Emporia's claims, it must be remembered that the city represents the interests of less than one-third of the students in the system being desegre-

¹³ "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." 349 U. S., at 299.

gated. Only the city officials argue that their plan is preferable to the "pairing" plan encompassing the whole of the city-county system. Although the county school board took no position in the District Court either for or against Emporia's action, it had previously adopted a resolution stating its belief that the city's action was not in the best interests of the county children. In terms of *Green*, it was only the respondents—not the county school board—who expressed a "preference for an apparently less effective method" of desegregation.

At the final hearing in the District Court, the respondents presented detailed budgetary proposals and other evidence demonstrating that they contemplated a more diverse and more expensive educational program than that to which the city children had been accustomed in the Greensville County schools. These plans for the city system were developed after the preliminary injunction was issued in this case. In August, 1969, one month before classes were scheduled to open, the city officials were intent upon operating a separate system despite the fact that the city had no buildings under lease, no teachers under contract, and no specific plans for the operation of the schools. Thus, the persuasiveness of the "quality education" rationale was open to question. More important, however, any increased quality of education provided to city students would, under the circumstances found by the District Court, have been purchased only at the price of a substantial adverse effect upon the viability of the county system. The District Court, with its responsibility to provide an effective remedy for segregation in the entire city-county system, could not properly allow the city to make its part of that system more attractive where such a result would be accomplished at the expense of the children remaining in the county.

A more weighty consideration put forth by Emporia

is its lack of formal control over the school system under the terms of its contract with the county. This argument is properly addressed to the practicality of the District Court's action. As we said in *Davis v. School Commissioners of Mobile County*, 402 U. S. 33, 37:

"Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."

And in *Swann; supra*, we noted that a desegregation plan cannot be regarded as a proper exercise of a district court's discretion where it is not "reasonable, feasible and workable." 402 U. S., at 31.

We do not underestimate the deficiencies, from Emporia's standpoint, in the arrangement by which it undertook in 1968 to provide for the education of its children. Direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society, and since 1967 the citizens of Emporia have had little of that control. But Emporia did find its arrangement with the county both feasible and practical up until the time of the desegregation decree issued in the summer of 1969. While city officials testified that they were dissatisfied with the terms of the contract prior to that time, they did not attempt to change it. They argued that the arrangement became intolerable when the "pairing" decree was entered, because the county officials who would control the budget of the unitary system lacked the desire to make the unitary system work. The District Court did not accept the contention that a lack of enthusiasm on the part of county leaders would, if Emporia children remained in the system, block a successful transition to unitary schools. The court felt that the "desire

of the city leaders, coupled with their obvious leadership ability," would make itself felt despite the absence of any formal control by the city over the system's budget and operation, and that the city's leadership would be "an important facet in the successful operation of any court-ordered plan." 309 F. Supp., at 679. Under these circumstances, we cannot say that the enforced continuation of the single city-county system was not "reasonable, feasible, and workable."¹⁴

The District Court explicitly noted in its opinion that its injunction does not have the effect of locking Emporia into its present circumstances for all time. As already noted, our holding today does not rest upon a conclusion that the disparity in racial balance between the city and county schools resulting from separate systems would, absent any other considerations, be unacceptable. The city's creation of a separate school system was enjoined because of the effect it would have had at the time upon the effectiveness of the remedy ordered to dismantle the dual system that had long existed in the area. Once the unitary system has been established and accepted, it may be that Emporia, if it still desires to do so, may establish an independent system without

¹⁴ City officials testified that one of the primary objections to the court's "pairing" decree was that it required a student to attend six schools in the space of 12 years. Dr. Tracey, the expert witness for the respondents, expressed the view that this aspect of the decree had undesirable effects from an educator's point of view. This argument, however, was never made to the District Court either before or at the time it adopted the "pairing" plan. Indeed, the city officials never even met with the County School Board or participated in the hearings that preceded the decree. After the June 25 order was entered, the District Court modified it at the request of the County Board, and at the hearing on a preliminary injunction against Emporia's withdrawal from the system, the court noted that it would be "delighted to entertain motions for amendment of the [pairing] plan at any time."

such an adverse effect upon the students remaining in the county, or it may be able to work out a more satisfactory arrangement with the county for joint operation of the existing system. We hold only that a new school district may not be created where its effect would be to impede the process of dismantling a dual system. And in making that essentially factual determination in any particular case, "we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals." *Swann, supra*, at 28. In this case, we believe that the District Court did not abuse its discretion. For these reasons, the judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 70-188

Pecola Annette Wright et al.,
Petitioners,
v.
Council of the City of
Emporia et al.

On Writ of Certiorari to
the United States Court
of Appeals for the
Fourth Circuit.

[June 22, 1972]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

If it appeared that the city of Emporia's operation of a separate school system would either perpetuate racial segregation in the schools of the Greenville County area or otherwise frustrate the dismantling of the dual system in that area, I would unhesitatingly join in reversing the judgment of the Court of Appeals and reinstating the judgment of the District Court. However, I do not believe the record supports such findings and can only conclude that the District Court abused its discretion in preventing Emporia from exercising its lawful right to provide for the education of its own children.

By accepting the District Court's conclusion that Emporia's operation of its own schools would "impede the dismantling of the dual system," the Court necessarily implies that the result of the severance would be something less than unitary schools, and that segregated education would persist in some measure in the classrooms of the Greenville County area. The Court does not articulate the standard by which it reaches this conclusion, and its result far exceeds the contemplation of *Brown v. Board of Education*, 347 U. S. 483 (1954), and

all succeeding cases, including *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971).

If the severance of the two systems were permitted to proceed, the assignment of children to schools would depend solely on their residence. County residents would attend county schools, and city residents would attend city schools. Assignment to schools would in no sense depend on race. Such a geographic assignment pattern is *prima facie* consistent with the Equal Protection Clause. See *Spencer v. Kugler*, 326 F. Supp. 1235 (N. J. 1971), *aff'd*, 404 U. S. 1027 (1972).

However, where a school system has been operated on a segregated basis in the past, and where ostensibly neutral attendance zones or district lines are drawn where none have existed before, we do not close our eyes to the facts in favor of theory. In *Green v. County School Board of New Kent County*, 391 U. S. 430 (1968), the Court ruled that dual school systems must cease to exist in an objective sense as well as under the law. It was apparent that under the freedom-of-choice plan before the Court in *Green*, the mere elimination of mandatory segregation had provided no meaningful remedy. *Green* imposed on school boards the responsibility to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U. S., at 442. That, I believe, is precisely what would result if Emporia were permitted to operate its own school system—schools neither Negro nor white, "but just schools." As separate systems, both Emporia and Greensville County would have a majority of Negro students, the former slightly more than half; the latter slightly more than two-thirds. In the words of the Court of Appeals, "[t]he Emporia city unit would not be a white island in an otherwise black county." 442 F. 2d, at 573. Moreover, the Negro majority in the remaining county

system would only slightly exceed that of the entire county area including Emporia. It is undisputed that education would be conducted on a completely desegregated basis within the separate systems. Thus the situation would in so sense be comparable to that where the creation of attendance zones within a single formerly segregated school system leaves an inordinate number of one-race schools, such as were found in *Davis v. School Commissioners of Mobile County*, 402 U. S. 33 (1971). Rather than perpetuating a dual system, I believe the proposed arrangement would completely eliminate all traces of state-imposed segregation.

It is quite true that the racial ratios of the two school systems would differ, but the elimination of such disparities is not the mission of desegregation. We stated in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 24 (1971):

"If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

It can no more be said that racial balance is the norm to be sought, than it can be said that mere racial imbalance was the condition requiring a judicial remedy. The pointlessness of such a "racial balancing" approach is well illustrated by the facts of this case. The District Court and the petitioners have placed great emphasis on the approximate six percent increase in the proportion of Negro students in the county schools that would result from Emporia's withdrawal. I do not

see how a difference of one or two children per class¹ would even be noticed, let alone how it would render a school part of a dual system. We have seen that the normal movement of populations could bring about such shifts in a relatively short period of time. Obsession with such minor statistical differences reflects the gravely mistaken view that a plan providing more consistent racial ratios is somehow more unitary than one which tolerates a lack of racial balance. Since the goal is to dismantle dual school systems rather than to reproduce in each classroom a microcosmic reflection of the racial proportions of a given geographical area, there is no basis for saying that a plan providing a uniform racial balance is more effective or constitutionally preferred. School authorities may wish to pursue that goal as a matter of policy, but we have made it plain that it is not constitutionally mandated. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S., at 16.

The Court disavows a "racial balancing" approach, and seeks to justify the District Court's ruling by relying on several additional factors thought to aggravate the effect of the racial disparity. The real significance of these additional factors is so negligible as to suggest that the racial imbalance itself may be what the Court finds most unacceptable.

First, the Court raises the specter of resegregation resulting from the operation of separate school systems in the county area, but on the record in this case this is,

¹ The record shows that the pupil-teacher ratio in the county schools is less than 25. Assuming some rough correspondence between this ratio and the size of classes, a 6% racial shift would represent a change in the racial identity of 1.5 students per class on the average.

at best, highly speculative. The Court suggests two reasons why such an additional racial shift could be anticipated with the existence of a separate school system for Emporia: white students residing in the county might abandon the public schools in favor of private academies, and white students residing in the city might leave private schools and enroll in the city school.

In assessing these projections it is necessary to compare the nature of the proposed separate systems with that of the court-ordered "pairing" system. Thus the first possibility, that of white students from the county entering private schools, assumes that white families would be more likely to withdraw their children from public schools that are 72% Negro than from those that are 66% Negro. At most, any such difference would be marginal, and in fact it seems highly improbable that there would be any difference at all. The second possibility postulated by the Court seems equally unlikely; it assumes that families from the city who had previously withdrawn their children from the public schools due to impending desegregation, would return their children to public schools having more Negro than white pupils. The Court does not mention the possibility of some form of mass migration of white families into the city from the outlying county. Of course, when there are adjoining school districts differing in their racial compositions, it is always conceivable that the differences will be accentuated by the so-called "white flight" phenomenon. But that danger seems remote in a situation such as this where there is a predominantly Negro population throughout the entire area of concern.

Second, the Court attaches significance to the fact that the school buildings located in the county were formerly used as all-Negro schools and intimates that

these facilities are of generally poorer quality than those in the city. But the District Court made no such finding of fact, and the record does not support the Court's suggestion on this point. Admittedly, some dissatisfaction was expressed with the sites of the elementary schools in the county, and only the city elementary school has an auditorium. However, all three elementary schools located in the county are more modern than any school building located in the city, and the county and city high school buildings are identical in every respect. On a fair reading of the entire record, it can only be said that any differences between the educational facilities located in the city and those in the county are *de minimis*.

Finally, the Court states that the process of desegregation would be impeded by the "adverse psychological effect" that a separate city system would have on Negro students in the county. Here again, the Court seeks to justify the District Court's discretionary action by reliance on a factor never considered by that court. More important, it surpasses the bounds of reason to equate the psychological impact of creating adjoining unitary school systems, both having Negro majorities, with the feelings of inferiority referred to in *Brown I* as engendered by a segregated school system. In *Brown I* the Court emphasized that the legal policy of separating children in schools solely according to their race inevitably generates a sense of inferiority. These observations were supported by common human experience and reinforced by psychological authority. Here the Court seeks to make a similar judgment in a setting where no child is accorded differing treatment on the basis of race. This wholly speculative observation by the Court is supported neither by common experience nor by scientific authority.

Even giving maximum rational weight to all of the factors mentioned by the Court, I cannot conclude that separate systems for Emporia and Greensville County would be anything less than fully unitary and nonracial. The foundation and superstructure of the dual system would be dissolved, and the result would not factually preserve the separation of races that existed in the past. We noted in *Swann* "that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." 402 U. S., at 26. This reflects our consistent emphasis on the elimination of the discriminatory systems, rather than on mere numbers in particular schools. The proposed systems here would retain no "one-race, or virtually one-race schools," but more important, all vestiges of the discriminatory system would be removed. That is all the Constitution commands.

It is argued that even if Emporia's operation of its own unitary school system would have been constitutionally permissible, it was nevertheless within the equitable discretion of the District Court to insist on a "more effective" plan of desegregation in the form of a county-wide school system. In *Brown v. Board of Education*, 349 U. S. 294 (1955) (*Brown II*), the Court first conferred on the district courts the responsibility to enforce the desegregation of the schools, if school authorities failed to do so, according to equitable remedial principles. While we have emphasized the flexibility of the power of district courts in this process, the invocation of remedial jurisdiction is not equivalent to having a school district placed in receivership. It has been implicit in all of our decisions from *Brown II* to *Swann*, that if local authorities devise a plan that will effectively eliminate segregation in the schools, a district court must accept such a plan unless there are

strong reasons why a different plan is to be preferred. A local school board plan that will eliminate dual schools, stop discrimination and improve the quality of education ought not to cast aside because a judge can evolve some other plan that accomplishes the same result, or what he considers a preferable result, with a two percent, four percent or six percent difference in racial composition. Such an approach gives controlling weight to sociological theories, not constitutional doctrine.

This limitation on the discretion of the district courts involves more than polite deference to the role of local governments. Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. Curricular decisions, the structuring of grade levels, the planning of extra-curricular activities, to mention a few, are matters lying solely within the province of school officials who maintain a day to day supervision that a judge cannot. A plan devised by school officials is apt to be attuned to these highly relevant educational goals; a plan deemed preferable in the abstract by a judge might well overlook and thus undermine these primary concerns.

The discretion of a district court is further limited where, as here, it deals with totally separate political entities. This is a very different case from one where a school board proposes attendance zones within a single school district or even one where a school district is newly formed within a county unit. Under Virginia law, Emporia is as independent from Greensville County as one State is from another. See *City of Richmond v. County Board*, 199 Va. 679, 684, 401 S. E. 2d 641, 644 (1958); *Murray v. City of Roanoke*, 192 Va. 321, 324, 64 S. E. 2d 804, 807 (1951). This may

be an anomaly in municipal jurisprudence, but it is Virginia's anomaly; it is of ancient origin, and it is not forbidden by the Constitution. To bar the city of Emporia from operating its own school system, is to strip it of its most important governmental responsibility, and thus largely to deny its existence as an independent governmental entity. It is a serious step and absent the factors that persuade me to the contrary in *Scotland Neck*,² decided today, I am unwilling to go that far.

Although the rights and powers of a bona fide political entity may not be used as a cloak for evasive action, neither can those powers be nullified by judicial intervention to achieve a unitary system in a particular way. When a plan devised by local authorities crosses the threshold of achieving actual desegregation, it is not for the district courts to overstep local prerogatives and insist on some other alternative. Judicial power ends when a dual school system has ceased to exist.

Since Emporia's operation of a separate school system would not compromise the goal of eliminating dual schools, there is no basis for requiring Emporia to demonstrate the necessity of its decision. The "heavy burden" test referred to in *Green* only applies where there is serious reason to doubt the efficacy of a school board's plan as a means of achieving desegregation, and there is no basis for such doubt here. Nonetheless, the Court's treatment of Emporia's reasons for establishing a separate system merits comment.

The Court makes light of Emporia's desire to create a high-quality, unitary school system for the children of its citizens. In so doing, the Court disregards the following explicit finding of the District Court:

• "The city clearly contemplates a superior quality

² *United States v. Scotland Neck City Board of Education*, and *Cotton v. Scotland Neck City Board of Education*, post, at —.

educational program. It is anticipated¹ that the cost will be such as to require higher tax payments by city residents. A kindergarten program, ungraded primary levels, health services, adult education, and a low pupil-teacher ratio are included in the plan" 309 F. Supp., at 674.

Furthermore, the Court suggests that if Emporia were in fact to provide the top-flight educational program the District Judge anticipated, that could only worsen the quality of education in the remaining county schools. To be sure, there was cause for concern over the relative quality of education offered in the county schools; as the District Court observed, county officials did "not embrace the court-ordered plan with enthusiasm." 309 F. Supp., at 680. The record shows that prior to the 1969-1970 school year, per pupil expenditures in Greensville County lagged behind the state median, and that the increase in the county school budget for the 1969-1970 school year was insufficient to keep abreast of inflation, not to mention increased transportation costs. But the city of Emporia was in no position to alleviate this problem for the county. The county had previously refused to allow the city to participate in joint administration of the schools, and the city had absolutely no power to affect the level of funding for the county schools. Under the contract, Emporia was the purchaser of whatever educational services the county had to offer. Out of understandable concern for the quality of these services, it sought to alter the contractual arrangement in order to provide better unitary schools.

There is no basis on this record for assuming that the quality of education in the county schools was likely to suffer further due to Emporia's withdrawal. The Court relies on the District Court's finding that "the desire of the city leaders, coupled with their obvious leadership

ability, is and will be an important facet in the successful operation of any court-ordered plan." 309 F. Supp., at 679. The District Court made this finding despite the fact that the county had refused to administer the schools jointly with the city, and despite uncontradicted evidence that there was no line of communications between the city and county governments, that the city government had been unable to get any cooperation from the county government, and that there was an atmosphere of active antagonism between the two governments. With all deference to the trier of fact, I cannot accept this finding as supported by evidence in the record of this case. It appears that the District Court wanted that "obvious leadership ability" of Emporia's citizens to exert its influence on the more reluctant leadership in the county. This is a laudable goal in the abstract, but the courts must adjust their remedies to the facts of each case as they bear on the central problem of eliminating a dual system.

Although acknowledging Emporia's need to have some "[d]irect control over decisions vitally affecting the education of its children," the Court states that since Emporia found the contractual arrangement tolerable prior to 1969, it should not now be heard to complain. However, the city did not enter that contract of its own free choice. From the time Emporia became a city, consideration was given to the formation of a separate school system, and it was at least thought necessary that the city participate in administration of the county school system. After the county rejected the city's proposal for joint administration, the county threatened to terminate educational services for city children unless the city entered an agreement by April 30, 1968. Only then—under virtual duress—did the city submit to the contractual arrangement. It was not until June of 1969

that the city was advised by its counsel that the agreement might be illegal. Steps were then taken to terminate the strained relationship.

Recognizing the tensions inherent in a contractual arrangement put together under these conditions, the Court indicates that Emporia might be permitted to operate a separate school system at some future time. The Court does not explain how the passage of time will substantially alter the situation that existed at the time the District Court entered its injunction. If, as the Court states, desegregation in the county was destined to fail if Emporia established its own school system in 1969, it is difficult to understand why it would not be an undue risk to allow separation in the future. The more realistic view is that there was never such a danger, and that the District Court had no cause to disregard Emporia's desire to free itself from its ties to Greensville County. However, even on the Court's terms, I assume that Emporia could go back to the District Court tomorrow and renew its request to operate a separate system. The county-wide plan has been in effect for the past three years, and the city should now be relieved of the court-imposed duty to purchase whatever quality of education the county sees fit to provide.

Finally, some discussion is warranted of the relevance of discriminatory purpose in cases such as these. It is, of course, correct that "[t]he measure of a desegregation plan is its effectiveness," *Davis v. Board of Commissioners*, 402 U. S. 33, 37 (1971), and that a plan that stops short of dismantling a dual school system cannot be redeemed by benevolent motives. But it is also true that even where a dual system has in fact been dismantled, as it plainly has been in Emporia, we must still be alert to make sure that ostensibly nondiscriminatory actions are not designed to exclude children from schools because of their race. We are well aware that the progress of school

desegregation since 1954 has been hampered by persistent resistance and evasion in many places. Thus the normal judicial reluctance to probe the motives or purposes underlying official acts must yield to the realities in this very sensitive area of constitutional adjudication. Compare *Griffin v. County School Board of Prince Edward County*, 377 U. S. 218 (1964), with *Palmer v. Thompson*, 403 U. S. 217 (1971).

There is no basis for concluding, on this record, that Emporia's decision to operate a separate school system was the manifestation of a discriminatory purpose. The strongest finding made by the District Court was that race was "in a sense" a factor in the city's decision; read in context, this ambiguous finding does not relate to any invidious consideration of race. The District Court relied solely on the following testimony of the chairman of the city school board:

"Race, of course, affected the operation of the schools by the county, and I again say, I do not think, or we felt that the county was not capable of putting the monies in and the effort and the leadership into a system that would effectively make a unitary system work . . .," 309 F. Supp., at 680.

I cannot view this kind of consideration of race as discriminatory or even objectionable. The same doubts about the county's commitment to the operation of a high-quality unitary system would have come into play even if the racial composition of Emporia were precisely the same as that of the entire county area, including Emporia.

Nor is this a case where we can presume a discriminatory purpose from an obviously discriminatory effect. Cf. *Gomillion v. Lightfoot*, 364 U. S. 399 (1960). We are not confronted with an awkward gerrymander or striking shift in racial proportions. The modest difference between the racial composition of Emporia's proposed separate school-

system and that of the county as a whole affords no basis for an inference of racial motivation. And while it seems that the more cumbersome features of the District Court's plan hastened the city's inevitable decision to operate a separate unitary school system, this was not because of any desire to manipulate the racial balance of its schools.

Read as a whole this record suggests that the District Court, acting before our decision in *Swann*, was reaching for some hypothetical perfection in racial balance, rather than the elimination of a dual school system. To put it in the simplest terms, the Court, in adopting the District Court's approach, goes too far.

